82-5989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

WINFORD L. STOKES,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

Cause No. A-489

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

WILLIAM J. SHAW,
Circuit Public Defender,
Member of the United States
Supreme Court Bar,

and

ROBERT J. MAURER,
Assistant Public Defender

OFFICE OF PUBLIC DEFENDER
Twenty-First Judicial Circuit
St. Louis County Courthouse
7900 Carondelet
Clayton, MO 63105
(314) 889-2778

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Contd.)

OPINION BELOW

The opinion of the Missouri Supreme Court is recorded at 638 S.W.2d 715 (Mo. banc 1982). A copy of this opinion appears in Appendix A, infra.

JURISDICTIONAL STATEMENT

The petitioner, Winford L. Stokes, was sentenced to death on January 17, 1980, for the offense of Capital Murder.

The judgment and sentence of the trial court was affirmed in the Missouri Supreme Court on August 31, 1982. An application for rehearing was denied on October 7, 1982 (Appendix B, infra).

On November 29, 1982, this Court issued an order extending time to file petition for writ of certiorari up to and including January 5, 1983.

Due to the foregoing, Title 28 U.S.C. §1257(3) confers jurisdiction upon this Court to review the judgment below by writ of certiorari.

QUESTIONS PRESENTED

1. Does imposition of a sentence of death where notice of evidence in aggravation was given on the day of trial violate the petitioner's rights to effective assistance of counsel, trial by jury, maintain a plea of not guilty, due process of law, and constitute cruel and unusual punishment in view of the subsidiary circumstances detailed in this petition?

2. Does the action of the trial court in permitting the endorsement of twenty-five (25) additional witnesses on the day of trial and in overruling the petitioner's motion for a continuance where the state first gave notice of evidence in aggravation on the day of trial violate the petitioner's rights to effective assistance of counsel, trial by jury, maintain a plea of not guilty, and due process of law in view of the subsidiary circumstances detailed in this petition?

3. Does imposition of a sentence of death subsequent to the trial court's order precluding the petitioner from introducing the state's previous offer of a concurrent sentence on a reduced charge in evidence of mitigation violate the petitioner's rights to due process and equal protection of the law and constitute cruel and unusual punishment?

4. Does the imposition of a sentence of death upon a finding that the petitioner has a substantial history of serious assaultive criminal convictions, §565.012.2(1) RSMo (1978), violate the petitioner's rights to due process and equal protection of the law and constitute cruel and unusual punishment?

5. Does imposition of a sentence of death upon a finding that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind, §565.012.2(7) RSMo (1978), violate the petitioner's right to due process and equal protection of the law and constitute cruel and unusual punishment?

6. Does the imposition of a sentence of death upon a finding that the offense was committed for the purpose of receiving money or any other thing of value, §565.012.2(4) RSMo (1978), violate the petitioner's right to due process and equal protection of the law and constitute cruel and unusual punishment in view of the circumstances detailed in this petition?

7. Does the imposition of a sentence of death upon a finding that the petitioner was an escapee of custody at the time of the offense, §565.012.2(9) RSMo (1978), where there was no admissible evidence of such, violate the petitioner's right to due process and equal protection of the law and constitute cruel and unusual punishment?

8. Does imposition of a sentence of death under §§565.001-565.016 RSMo (1978) violate the petitioner's right to equal protection of the law and constitute cruel and unusual punishment

as this statute is applied and enforced by the courts in the State of Missouri?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V;

United States Constitution, Amendment VI;

United States Constitution, Amendment VIII;

United States Constitution, Amendment XIV.

[See Appendix C].

STATEMENT OF THE CASE

On June 12, 1978, a criminal indictment was filed in the Circuit Court of St. Louis County charging the petitioner with the offense of Capital Murder (L.F. 70). It should be noted that the statute cited, §559.005 RSMo (1969), had been declared unconstitutional in State v. Duren, 547 S.W.2d 476 (Mo. banc 1977), and while it may have been adequate to support a conviction, it could not support a sentence of death.

On July 13, 1979, one (1) year and thirty-one (31) days after the above filing, the petitioner was informed of the charge. The petitioner entered a plea of not guilty (L.F. 12).

On September 10, 1979, the petitioner entered pleas of guilty to the following charges in the City of St. Louis:

78-117 Robbery First Degree and Armed Criminal Action;

78-967 Murder Second Degree and Robbery First Degree;

78-609 Escaping Custody Before Conviction.

On cause numbers 78-117 and 78-967, the petitioner received concurrent sentences of fifty (50) years in the Missouri Division of Corrections (T. 351-53). The pleas and sentences recived in the aforementioned cases in the City of St. Louis were an aspect of a negotiated settlement of the petitioner's pending cases. It should be noted that the successful plea of September 10, 1979, was the petitioner's second attempt to enter such a plea.

The participation of the state's officers in St. Louis County in the aforementioned settlement consisted of the following:

1. a reduction of this charge from Capital Murder to Murder, Second Degree, and;

2. a recommendation of a sentence concurrent with the aforementioned fifty (50) year sentence upon a plea of

guilty to the reduced charge (T. 359-60).

On September 20, 1979, the petitioner attempted to complete the settlement in St. Louis County (T. 359-62). At that time, the petitioner determined to continue his plea of not guilty to the charge in issue. Pursuant to this transaction, the state withdrew its reduction of the charge and reinstated the original indictment (L.F. 18). The validity of the pleas of September 20, 1979, were dependent upon a compatible settlement of this charge, then pending in St. Louis County.

The petitioner's motion to dismiss the indictment on the basis of the incorrect statutory reference (L.F. 26) was heard and overruled on September 27, 1979 (L.F. 33). The state took no action in view of the incorrect citation.

The cause was called to trial on October 22, 1979, in Division No. 13 of the Circuit Court of St. Louis County, The Honorable John R. Rickhoff presiding (T. 1).

The state filed notice of evidence in aggravation on the day of trial (L.F. 58-59). Two of the four statutory aggravating circumstances alleged relied wholly or substantially on the pleas of September 10, 1979. This issue was raised before the trial court in the context the petitioner's motion to exclude the death penalty (L.F. 60-61, T. 7-10). In addition to raising his objection to the untimeliness of notice (T. 7), the petitioner suggested that the state's conduct was an effort to penalize him for failing to complete a settlement on September 20, 1981 (T. 7-8). Petitioner's motion to exclude the death penalty was overruled (T. 10). This motion was renewed after a verdict had been received and prior to the sentencing phase (T. 336). The issue was presented again at the hearing on petitioner's motion for a new trial (T. 359-62). This motion was overruled (L.F. 139).

The issue was properly preserved by the petitioner and the Missouri Supreme Court offered the following observations: that the prosecuting attorney made an oral declaration of his intention to seek the death penalty at the time of the unsuccesful attempt at settlement on September 20, 1979; that the aggravating circumstances as alleged the day of trial could have come as no surprise to the petitioner; that imposition of a harsher penalty following trial than was offered in plea negotiations is not violative of due process. In sum, the court failed to perceive prejudice and found "no denial of due process of constitutional significance." State v. Stokes, 638 S.W.2d 715, 720-21 (Mo. banc 1982).

Contemporaneous with the filing of notice of evidence of aggravation, the state filed an amended information in lieu of indictment alleging the conviction of a prior felony (L.G. 69). Contained thereon was a citation to the correct state capital murder provisions, §§565.001 and 565.008 RSMo (1978).

In the course of examining this document, petitioner's trial counsel discovered that the reverse contained an extensive list of witnesses, twenty-five (25) of whom had not previously been endorsed (L.F. 70-71). The petitioner asserted surprise and prejudice; he informed the trial court that he had been "proceeding under the indictment as filed and the endorsement of witnesses thereon. And these witnesses were basically police officers and none of the lay witnesses had been specifically endorsed" (T. 4).

The prosecuting attorney claimed that these witnesses had been endorsed, however, a review of the court's "file" established that this was not the case. At this point, the court's proceedings went off the record (T. 2). When the record resumed,

the prosecuting attorney offered that ". . . there had been a sheet. I don't know, evidently it had never gotten filed --" (T. 2). Thereafter, the state relied on the fact that police reports given the petitioner contained references to the witnesses just endorsed (T. 3-4). The trial court accepted such notice specifically and overruled petitioner's objection to the endorsement. Petitioner then made an oral motion for a continuance, ". . . in order to more properly look at the list of witnesses . . ." (T. 10). This motion was unopposed by the state: "Other than what I said before, in terms of particular request for continuance, I am not going to have any particular position on it" (T. 10). The petitioner's motion for a continuance was overruled (T. 10).

The issue was preserved by petitioner's trial counsel in his motion for a new trial (L.F. 120-21). He reminded the court of the need to reconsider trial strategy and to properly prepare cross-examination.

In the course of the trial, eleven (11) witnesses testified for the state. Of these witnesses, five (5) were drawn from the list of twenty-five (25) previously unendorsed witnesses. The evidence adduced in the trial of the petitioner for the murder of Pamela R. Benda on or about February 18, 1978, is reflected in the opinion of the Missouri Supreme Court, Stokes, supra, 717-719. The testimony of the five (5) unendorsed witnesses is summarized below:

Lucy Malone related that she was a long-time friend of the victim (T. 187-88). She identified State's Exhibits Nos. 47 and 49 as photographs depicting the victim's automobile (T. 188).

Romona Eunita Tabron testified that she was married to the petitioner at the time of the offense, but was not living

with him at that time. She had since obtained a divorce (T. 239-40). She related that she accompanied the petitioner on a trip to South Bend, Indiana, on March 3, 1978 (T. 240). Some time later, while the petitioner was being questioned in custody by the police, Romona Tabron was brought into the room to listen to the petitioner's statement of the circumstances of February 18, 1978. She contradicted the petitioner's account (T. 240-42). She further identified State's Exhibit No. 67, a pendant watch, as having been given to her by the petitioner (T. 242). It was suggested that this item had belonged to the victim (T. 225), however, no witness on behalf of the state testified to this and the fact was not established. Mrs. Tabron concluded her testimony by identifying State's Exhibit No. 49 as depicting an automobile driven by the petitioner in late February of 1978 (T. 243).

Myrna Savoldi was called and related that she was a friend and supervisor of the victim at her place of employment (T. 252-53). She identified State's Exhibit No. 59 as a knife which she had seen in the victim's kitchen on prior occasions (T. 253-54). It had been suggested that this knife had possibly been used in the commission of the offense (T. 173, 192).

Robert Benda related that he was the ex-husband of the victim and had custody of their three children (T. 256). He identified State's Exhibits Nos. 47, 48, and 49 as depicting the victim's automobile.

Wilbert Daniels was called by the state. He recounted that he had spent the afternoon and evening of February 18, 1978, in the company of the petitioner and a Darlene McCauley (late endorsement, not called, L.F. 71)(T. 259-60). This group had dinner at the Heritage House and later in the evening arrived

at a bar named "Some Place Else" (T. 260). During the course of the evening, Mr. Daniels observed the petitioner dancing with the victim. Shortly thereafter the victim introduced herself to Mr. Daniels (T. 261-62). When Mr. Daniels suggested leaving at about 11:30 P.M., the petitioner told him he would get a ride with the victim. The petitioner later related to Mr. Daniels that as he might not be able to get all the way home, he had better leave with Mr. Daniels. The victim then told Mr. Daniels that she would take the petitioner home (T. 262). The witness concluded his testimony by relating that he had never met the petitioner's wife, thus contradicting the account given the police by the petitioner (T. 263).

The Missouri Supreme Court dealt with the issue in the following wise:

1. An "off the record discussion established" the existence of a "second sheet" of endorsements somehow lost and viewed this as precluding a finding of bad faith.

2. The names of unendorsed witnesses had appeared in police reports.

3. The court "assumed" late endorsement of only five (5) additional witnesses.

4. The testimony of unendorsed witnesses was either "innocuous or capable of contemplation."

In sum, the court failed to perceive prejudice or denial of due process of constitutional significance, Stokes, id, 719-721.

The cause proceeded to deliberation and the jury returned a verdict of guilty for the offense of capital murder (T. 335).

In the course of a hearing on the upcoming sentencing phase of the trial, the state offered a motion in limine to

preclude the petitioner from offering evidence or argument concerning the pre-trial settlement negotiations in way of mitigation. Petitioner's exception to this motion was overruled and the motion was sustained (T. 339-40). The petitioner offered no evidence in mitigation (T. 347).

The petitioner argued that §565.006(2) RSMo (1978), in limiting evidence of mitigation by subjecting such to the laws of evidence, unconstitutionally exposed the petitioner to a sentence of death on an arbitrary and capricious basis (App. Br. 70-77). The Missouri Supreme Court simply noted that ". . . Since appellant offered nothing by way of evidence in 'mitigation' the argument is truly academic and is rejected." Stokes, supra, 724.

The state then offered its evidence in aggravation, the pleas of September 10, 1978 (T. 340-42). In the course of making his objections, the petitioner pointed out that he did not admit to any of the crimes alleged in aggravation and pointed out the date of the pleas and the fact that the pleas alleged in aggravation had occurred subsequent to the offense before the court (T. 343). The petitioner's objections were overruled (T. 344). Petitioner's original motion to exclude the death penalty was renewed (T. 336).

The state proceeded to offer evidence of the following four (4) aggravating circumstances (T. 345-47), all of which were found by the jury in assessing a sentence of death (L.F. 113):

1. ". . . the very nature of this crime is so violent, horrible, and inhuman that it involved torture. For that I ask you to recall the evidence as you heard it" (T. 345).

2. ". . . that the crime was committed for the purpose of monetary gain. Something of value, the stolen

car, the pendant" (T. 345).

3. ". . . that this defendant has a serious history of assaultive crimes. Not just any crimes but violent assaultive crimes." The aforementioned pleas of September 10, 1978 were offered (T. 346).

4. ". . . that he was an escapee of custody at the time he committed this murder." The aforementioned plea of September 10, 1978 was offered (T. 346).

This recitation was a reference to the court's Instruction No. 19 (L.F. 108, Appendix D). The instruction followed the statutory language of §565.012.2(1),(4),(7),(9) RSMo (1979), from which the prosecuting attorney departed in his offer of proof.

In his motion for a new trial, the petitioner attacked the submission of the second aggravating circumstance on the basis that it was vague and misleading and ambiguous (L.F. 126). The petitioner went on to attack the remaining instructions on a similar basis (L.F. 127-29), and the issues were preserved for review.

In the Supreme Court of Missouri, the petitioner attacked the constitutionality of submission of all of the aggravating circumstances offered on the basis that they were vague, misleading and permitted imposition of a sentence of death in an arbitrary, capricious, and unreasonable manner (App. Br. 85-90).

The Supreme Court of Missouri failed to address these issues, however, the following remarks contained in the dissent of Seiler, J., Bargett, J. concurring, should be noted:

"I reserve judgment on the issue whether the statutory aggravating circumstances taken from §565.012.2(1), 'whether the defendant has a substantial history of serious assaultive convictions'.

is unconstitutionally vague. Appellant raised and argued the point in his brief, but the principal opinion does not discuss the issue, and the facts here do warrant an application of pertinent constitutional tests. However, it should be pointed out that the Georgia Supreme Court, whose lead this court repeatedly follows in death penalty cases, held the 'serious assaultive convictions' aggravating circumstance unconstitutionally vague in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

Stokes, supra, 725.

Finally, the petitioner attacked the imposition of a sentence of death under the current Missouri statutory scheme as constituting cruel and unusual punishment (L.F. 127-31, App. Br. 80-85). The Supreme Court of Missouri found this point to be without merit. Stokes, id. 724.

A R G U M E N T

I

The petitioner herein enumerates the circumstances which rendered the imposition of the death penalty a denial of due process of law, trial by jury, and effective assistance of counsel:

1. Notice of evidence of aggravating circumstances enabling imposition of the death penalty was first given on the day of trial.

2. §565.006.2 RSMo (1978) provides that, "Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible."

3. The state endorsed twenty-five (25) previously unendorsed witnesses on the day of trial, five (5) of these being among the eleven (11) witnesses who gave testimony.

4. The petitioner's motion for a continuance in view of the above, which was unopposed by the state, was overruled.

5. The evidence of aggravation relied on by the state placed substantial reliance on pleas, the validity of which depended upon a negotiated settlement of both the offenses used in aggravation and the cause on trial.

6. In connection with an attempted negotiated settlement of the cause on trial, the state had reduced the charge against the petitioner to Murder Second Degree and offered a recommendation of a sentence concurrent with sentences on offenses used in aggravation.

7. The petitioner's motion to exclude the death penalty was ovarruled.

Violations of a citizen's rights to due process of law, trial by jury and effective assistance of counsel of this magnitude must shock the conscience. Whether the preceding was the result of deliberate conduct or negligence by the state, such an assault on principles of fundamental fairness deeply undermines the integrity of the judicial process.

The circumstances now before this Court are no less egregious than those presented in Gardner v. Florida, 430 U.S. 349 (1977). In this case the jury imposed a life sentence and the trial court, with at least partial reliance on a confidential pre-sentence report, imposed death, id, 353. The Court held first that as death is a different kind of punishment from any other which may be imposed, it is of vital importance to the defendant and the community that such a decision be and appear to be based on reason rather than caprice and emotion. Secondly, the Court held:

> ". . ., it is now clear that the sentencing process, as well as the trial itself, must satisfy

the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner, id. 358.

The prosecuting attorney repeatedly told the trial court that at all times his office had considered the petitioner's case to be a death penalty case (T. 9, 362). He offered no explanation for his office's policy in reducing the charge and offering a settlement which would have resulted in the petitioner serving no additional time in custody for this offense. He offered no explanation for the extraordinary tardiness in filing notice of evidence in aggravation. He offered no explanation for the extraordinary delay in correcting the defective indictment. His explanation for the late endorsement of witnesses was unconvincing.

The quality of the procedures employed in the petitioner's case were appalling. The prejudice could not be more glaring.

After being held for considerably more than one year without counsel and without notice of the charges, the petitioner determined to accept a plea agreement covering this case and cases in the City of St. Louis. When ten (10) days after accepting a fifty (50) year sentence in the City, he failed to complete the arrangement, the prosecutor announced his intention

to seek death. No action was forthcoming until the day of trial. The petitioner was then denied a continuance, which was unopposed by the prosecution.

All of the pleas of September 10, 1979, used against the petitioner could have been withdrawn and rendered harmless had petitioner's counsel received proper notice. Notice the day of trial is no notice. Oral expression of intent which go unacted upon is no notice. The validity of the pleas in the City of St. Louis were contigent upon a plea in this case. Combined with the endorsement of twenty-five (25) additional witnesses at the same time, the petitioner's right to effective addistance of counsel at the sentencing phase of his trial is reduced to a farce and a mockery.

In view of the amount of improper, prejudicial evidence before the jury, whether the death penalty would have been imposed on admissible evidence alone is a matter of the sheerest and most unreliable conjecture.

Moreover, the issue of capital punishment should never have been allowed to go before the jury.

From its inception, the State of Missouri conducted this case in the most dilatory, slipshod and duplicitous fashion conceivable. Then, when the petitioner expressed reluctance to complete a plea bargain, the state made a public spectacle of its outrage (L.F. 60; P.T. 5), announced its intention to secure the petitioner's death, but still did not strike until the last minute. This is cavalier, capricious and an abomination. This is not a case where a defendant turns down five years and receives ten or even a thousand years from a jury. This is a case where the State of Missouri offers to give a crime away for nothing and then seeks death under the advantage of the most prejudicial circumstances it can orchestrate.

A defendant may not be penalized for exercising constitutional rights:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exervice of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

North Carolina v. Pearce, 395 U.S. 711, 725 (1968).

The right to trial by jury is hardly less fundamental than the right to appeal. No new evidence justifying the death penalty came to light after September 20, 1978, when the charge was reduced. The petitioner simply exervised his right to trial. See also Griffin v. California, 380 U.S. 483 (1965).

The Federal Kidnapping Act authorized death sentences only for defendants who proceed to trial. In holding that such a provision unconstitutionally impaired the free exercise of the right to trial by jury this Court stated:

> ". . . the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury.

> The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amentment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

United States v. Jackson, 390 U.S. 570, 581 (1968).

The petitioner suggests that the State of Missouri may not accomplish by practice what it would be precluded from accomplishing by legislation. It makes little difference to an individual facing execution whether his rights were violated by a legislative body or a prosecuting attorney's office. The actions of the state are both unnecessary and excessive for any legitimate purpose. If this case is allowed to set a pattern for imposition of the death penalty in Missouri, the confidence of the people in their fundamental rights must be severely diminished. There is no reliability to such conduct. The causes of those who would surrender their rights in this chilled atmosphere might never be heard. For such a reason alone, the petitioner must be heard.

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), rehearing denied 441 U.S. 937 (1979), is distinguishable. In the petitioner's case there was no possibility that he could be sentenced to death had he followed through with the settlement offered. Murder in the second degree is not a capital offense. There was no fair warning. A change in the state's position on punishment of the magnitude presented in this case required more than informal pronouncements.

Bordenkicher v. Hayes, 434 U.S. 357 (1978), is inapposite, the comments of the Court having reference to far more commonplace

criminal dispositions than that presented herein.

The issues raised by the petitioner do nothing to hinder the efficacy of plea negotiations. The risk of conviction of capital murder, which carries a minimum sentence of life without parole for a minimum of fifty (50) years, was sufficient legitimate coercion after September 20, 1978. This in itself was drastically more harsh than the state's offer of September 20, 1978. The petitioner has no quarrel with facing trial on a higher charge after withdrawal from plea negotiations. If, in the opinion of the prosecuting attorney's office, this crime was worth no real time on September 20, 1978, it was not worth death one month later.

The petitioner would clarify the procedural due process argument posed in the court below. In the case of capital punishment no balancing test is appropriate. There is no tension between the private interest of the litigant and the public interest of the state. Both alike have a primary and vital stake in the maintenance of procedures which are orderly, fair, consistent, and reasonable. The litigant's interest is obviously that it may save his life. The state's interest is that it will sustain a degree of legitimacy in enforcing a practice of questionable civility and dubious morality. Substantive due process requires no less in view of the awesome consequences. The opinion of Seiler, J., with concurrence of Bardgett, J., speaks eloquently to this point. State v. Stokes, 638 S.W.2d 715, 725-726 (Mo. banc 1982).

The prosecution of those accused of crime is a difficult task. The officers of the state simply must not be permitted to adopt what they perceive to be the standards of those they accuse.

The State of Missouri has no right to take any man's life under such circumstances as are presented in this case. The reasoning of the majority in the court below flies in the face of a concept of ordered liberty. A focus on ghoulish detail is no substitute for our Supreme Court's mandated review of whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. §565.014.3(1) RSMo (1978).

Since no evidence in aggravation was offered prior to trial, none was properly available to support a finding of aggravation permitting imposition of the death penalty. The Supreme Court of this state must not be permitted to nullify procedural safeguards enacted in our legislature to protect federal constitutional rights, §§565.006(2) and 565.016.1(2), by refusing to apply those rights.

Under the circumstances detailed herein, a sentence of death constitutes cruel and unusual punishment and must be set aside.

II

If a sentence of death is a different kind of punishment from any other that may be imposed, a capital murder trial where such a sentence is sought is a different kind of trial from any other that may be conducted. Identical due process and assistance of counsel considerations apply. The trial court did not need to refuse to allow the last minute endorsement. It needed only to grant a reasonable request for a continuance which was unopposed by the state. A trial court whose only interest is in compiling statistics of cases disposed is not competent to sit in judgment of a man's life. Assistance of counsel implies more than enabling a procedure in which rabbits are pulled out of

a hat. Notice of evidence of four (4) aggravating circumstances, the first clear indication to seek death, endorsement of twenty-five (25) additional witnesses all on the morning of trial, — a finding of guilt under such prejudice is worthless.

In this case, the lay witnesses who testified were the heart of the prosecution's case. The state's case was immeasurably enhanced by its use of these witnesses. Including those witnesses endorsed the day of trial, a total of fifty-eight (58) witnesses were endorsed (L.F. 70-71). The trial record is barren of anything which would lend support to the Missouri Supreme Court's assumption that only five (5) new witnesses were endorsed. State v. Stokes, 638 S.W.2d 715, 720 (1982).

Presumably all fifty-eight (58) of these people and a good many more were mentioned in police reports, the so-called "full discovery." This is not notice. The situation itself reeks of prejudice so that little more than the bare facts are needed to call for reversal. There was no notice as to who would be called. As it transpired, six (6) witnesses were called from the original list of thirty-three (33) of which the petitioner had notice. These witnesses were professionals whose testimony was sufficient to make a submissible case, if not a strong one. The use of the lay witnesses inevitably would effect such crucial decisions as whether the petitioner would testify. Issues such as how to deal with former wives and friends as hostile witnesses in a trial for the petitioner's life cannot be raised the day of trial. The testimony of the victim's former friends and family had considerable emotional impact. In sum, the testimony of these witnesses was neither "innocuous nor capable of contemplation," although much of it was objectionable and irrelevant.

An attorney who is put in a position where his effectiveness is precluded by surprise and want of time to prepare cannot

be required to indicate specifically what the result would have been had he been permitted to do his job. Demonstration of prejudice does not require such clairvoyance. Reference to the need to reconsider trial strategy and prepare cross-examination is appropriate. The record suggests that the performance of petitioner's trial counsel was impaired.

Generally, the matter of a continuance is within the sound discretion of the trial court. While not every denial of such requests are violative of due process, an arbitrary refusal will be, based on the circumstances of the case. See U.S. ex rel. Hussey v. LaValle, 302 F.Supp. 305, affirmed 428 F.2d 457, cert. denied 400 U.S. 995 (D.C.N.Y. 1969). Furthermore, the accused's constitutional right to assistance of counsel places an additional limit to such discretion, U.S. v. Waldman, 579 F.2d 649 (C.A. Mass. 1978). Every case must be judged on its own facts. The facts of this case require redress. There is no possible suggestion that the petitioner's request could have been made out of an improper motive or bad faith. On the contrary, deference to the petitioner was particularly called for where the state had allowed its claim to languish interminably. Stale claims are not favored by the law and far less so in criminal cases. Dickey v. Florida, 398 U.S. 30 (1971).

A number of cases deal with one or two late endorsements, perhaps the day of trial. Others deal with failure to endorse the name of witnesses on retrial following appeal. This obviously is not the petitioner's situation. In connection with 18 U.S.C.A. §3432 it has been suggested that failure to provide a list of witnesses in a capital case is ordinarily reversible error. Hall v. U.S., 410 F.2d 653, cert. denied 396 U.S. 970 (C.A. Va. 1969). Regardless of considerations relevant to federal statutory interpretation, error and prejudice

must be determined on a case by case basis. Again, this case demonstrates a level of prejudice that is extreme. The conviction is worthless.

III

Initially it should be reiterated that the petitioner feels that the conduct of the state in plea negotiations alone should have precluded pursual of the death penalty. However, should such a thing be possible under a hesitating application of due process, it would require more timely formal notice and the opportunity of the accused to raise the state's previous offer in plea negotiations as evidence of mitigation. It could hardly be argued that this would foster plea bargaining in bad faith. The accused's life would still be in jeopardy. A jury might easily view such a mitigating circumstance as insufficient to preclude the ultimate penalty. Prosecutors need hardly fear that their conduct will be viewed with the same degree of skepticism by the public that it should be subjected to within the judicial process.

The public interest is not served by a prosecuting attorney who will approach a defendant in an apparent guise of compassion and leniency and then abruptly demand his life in order to curry favor with volitile public opinion. The petitioner suggests that the image and reputation of an elected official should count for little when a man's life is in the balance. If §565.006.2 RSMo. is to be interpreted to preclude such information as being contrary to "the laws of evidence" it indeed permits imposition of the death penalty in an arbitrary and capricious manner.

The authority in favor of the petitioner's position on this issue is overwhelming. The circumstances of the plea arrangements were central to the petitioner's character and record. The laws of evidence may not be applied mechanistically

to defeat the ends of justice. See: Green v. Georgia, 442 U.S. 95 (1979); Chambers v. Mississippi, 410 U.S. 284 (1973); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 431 U.S. 633 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976).

IV

As noted previously, the validity of the petitioner's pleas on September 10, 1978, were contingent upon an event which never took place, that is, a plea of guilty to the offense now before this Court. Assuming arguendo, but of course not conceding, no invalidity due to untimeliness of notice, the petitioner had the following admissible history: a manslaughter conviction and a robbery conviction in 1971 for which he received a sentence of nine (9) years to be served concurrently (L.F. 58-59; T. 340-42, 346-47, 350).

The petitioner contends that the words "substantial history" and "serious assaultive criminal convictions" §565.012.2(1) RSMO (1978), are too vague and nonspecific to be applied evenhandedly by a jury. Whether the petitioner's history meets this legislative criterion is a highly subjective issue which leaves his fate utterly to whim and conjecture.

The petitioner's case is indistinguishable from Arnold v. State, 236 Ga. 534, 224 S.E.2d 386, 391-92 (1976). In the context of the imposition of a sentence of death such latitude of discretion cannot withstand constitutional scrutiny. See also: Smith v. Goguen, 415 U.S. 566, 572 (1974); Grayned v. City of Rockford, 408 U.S. 104, 109 (1971); Coates v. Cincinnati, 402 U.S. 611 (1971); Gelling v. Texas, 343 U.S. 960 (1952); Furman v. Georgia, 408 U.S. 238 (1971).

The Court is additionally referred to the opinion of Seiler, J., Bardgett, J., concurring, State v. Stokes, supra, 725.

V

The above authority is applicable to the petitioner's challenge to §565.012.2(7) RSMo (1978), allowing imposition of death upon a finding that "the offense was outrageously or wantonly vile in that it involved torture or depravity of mind." Regardless of construction on appellate review, the above instruction is what the jury uses to impose sentence. Second-guessing upon appellate review is no substitute for clear-cut objective criteria in sentencing instructions in the first instance. Such an instruction does not provide specific and detailed guidance.

Under such an instruction death may be imposed either upon a finding of forture, i.e. aggravated battery or depravity of mind. Thus, whether death is imposed on a proper basis or not is left purely to the speculation of appellate courts. In every case decided under such an instruction, the distinct possibility arises that death was imposed on an arbitrary and capricious basis.

In the present case there was no evidence that "depravity of mind" was attributable to the mental state which lead to the petitioner's alleged offense. "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions." Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980).

Because of vagueness, ambiguity and lack of specificity, this instruction cannot withstand constitutional due process scrutiny. The Court is requested to reconsider its holding in Gregg v. Georgia, supra, in light of the authority and standards set forth previously and the trend implied in Godfrey, supra.

Clear-cut definitions and standards will not prejudice the state.

VI

The petitioner includes §565.012.2(4) RSMo (1978): that ". . . the offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value," in his challenge on the preceding basis. On a plain meaning interpretation the section is clearly meant to refer to contract murder or murder for hire. As it is applied it permits a sentence of death on a finding of felony-murder or murder first degree which is not a capital offense. Compare §565.003 RSMo (1978), which is punishable under §565.008.2 by life imprisonment only:

> "First degree murder defined.—Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degre murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

This situation does not amount to an objective standard. It is inherently misleading and hence arbitrary.

VII

The petitioner challenges §565.012.2(9) on the basis that there was no admissible evidence upon which the jury could base such a finding. Additionally, the petitioner suggests that while murder committed in the course of an escape may be a sufficient aggravating circumstance, its application to an individual who has completed such an offense is arbitrary and discriminatory and cannot support a sentence of death.

The petitioner challenges all of the aggravating circumstances found in his case on the basis that they establish an unreasonable classification, individuals accused of capital murder, and do not sufficiently guide a jury in making a reasonable determination of sentence. Thus, all of the above render imposition of death cruel and unusual punishment.

In connection herewith the petitioner urges this Court not to endorse the pyramid rationale of the Georgia Supreme Court in Zant v. Stephens, ___S.E.2d____(Ga. Oct. 27, 1982). It begs the issue. If one or more aggravating circumstances is found invalid, the entire fact finding process is rendered unreliable. Second guessing by appellate courts cannot extend to such an extent without violating due process, equal protection, and the Eighth Amendment.

VIII

The preceding leads the petitioner to challenge the death penalty on equal protection and Eighth Amendment grounds. It is clear that the supposed safeguards in application and review of this dangerous and ritualistic practice means nothing in the State of Missouri. A review of the principles in Furman v. Georgia, 408 U.S. 238 (1971), and Gregg v. Georgia, supra, is sought. The sequence of events in the petitioner's case give new meaning to the observation that "the magnitude of a decision to take human life is probably unparalleled in the experience of a member of a civilized society." Marion v. Beto, 434 F.2d 29, 33 (C.A. Tex. 1970). The tears of jurors in St. Louis County attest to this fact. It should cease.

C O N C L U S I O N

The Missouri Supreme Court, by ignoring the factors set out herein, did not correctly apply the prevailing standards of review on the constitutional questions presented in this petition. Also, the standard was incorrectly applied when the improper factors detailed were considered.

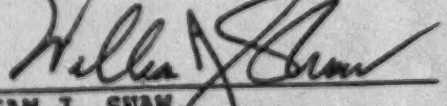
By omission or commission the Missouri Supreme Court has rendered decisions on federal questions which are in conflict with the principles pronounced by this Court and appellate courts of sister jurisdictions, Hall v. U.S., supra, (C.A. Va. 1969); Hussey v. LaValle, supra (D.C.N.Y. 1969); U.S. v. Waldman, supra, (C.A. Mass. 1978); Arnold v. State, supra, (Ga. 1976). For these reasons, the petitioner respectfully requests this Court to issue its writ of certiorari, based on the considerations contained in United States Supreme Court Rule 17.1(b) and (c).

Additionally, the facts of petitioner's cause are consistent with other cases detailed herein that have been granted review by this Court.

Finally, the prevailing standard in Missouri for the review of fundamental constitutional rights detailed herein is inconsistent with this Court's standards.

This Court's attention is required to ensure the State of Missouri's conformance with national standards of appellate review on the issues detailed herein.

Respectfully submitted,



WILLIAM J. SHAW,
Circuit Public Defender,
Member of the United States
Supreme Court Bar,

and

ROBERT J. MAURER
Assistant Public Defender

Attorneys for Petitioner.

Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Respondent,

vs.

WINFORD L. STOKES,
Appellant.

No. 61963

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
The Honorable John R. Rickhoff, Judge

The appellant, Winford L. Stokes, was tried to a jury which found him guilty of capital murder and assessed his punishment at death. Secs. 565.001, 565.008 and 565.012, RSMo 1978. Judgment was entered accordingly and he has appealed to this Court which has exclusive appellate jurisdiction by reason of Section 3 of Article V of the Constitution of Missouri. Having reviewed and considered all errors enumerated by way of appeal and the sentence as mandated by § 565.014, RSMo 1978, the same is affirmed.

The record reflects that the victim, Pamela R. Benda, was thirty-three years of age, divorced and the mother of three children--then in the custody of their father; that she was employed at the Washington University Faculty Conference Center and recently had moved to an apartment at 6600 Washington in University City, Missouri; and, that during the evening of Saturday, February 18, 1978, she arrived at a lounge called "Some Place Else" on Lindbergh Boulevard in St. Louis County.

On that date, appellant was staying with a woman named Darlene at the Northwestern Hotel in the city of St. Louis. That evening

she had a date with a friend named Wilbert, and appellant joined the two for dinner at the Heritage House and later arrived at the named lounge between 8:30 and 9:00 p.m. They secured a table close to the dance floor, ordered drinks and Wilbert danced with Darlene. When later orders were delayed, appellant went to find a waitress. Soon thereafter, appellant was seen dancing with the victim and she returned to the table with him and introduced herself. She joined the group which imbibed several rounds of drinks but it seems agreed that no one was intoxicated. At approximately 11:30 p.m., Darlene and Wilbert announced they were ready to leave. Appellant asked Wilbert to go to the restroom with him where he said that he "would catch a ride home" as the victim had promised to take him. She later confirmed the arrangement with Wilbert and the two were left at the lounge.

On Tuesday, February 21, 1978, the manager of the apartment building used his pass-key to allow a serviceman to enter the victim's apartment. When they entered a back bedroom, they discovered her nude body sprawled on the floor with a pillow or pillow case over her head and an apron wrapped around her neck. The police were called and her employer arrived later to identify the body. The apartment was in disarray with the bedroom ransacked, and the police remained nearly eight hours collecting evidence. Among other things, the toilet bowl contained a butcher knife and the victim's clutch purse with the contents therefrom. Several latent fingerprints were lifted from different objects in the room and four prints were determined later to be those of appellant. Although the record does not divulge how it was determined, the police later learned that the victim's pendant watch and her automobile were missing. After the discovery of this evidence, a "pickup" order was issued for appellant.

On the next day, February 22, an autoposy was performed by Dr. Eugene Tucker, a pathologist in the office of the Medical Examiner of St. Louis County. It was found that the body had passed through rigor mortis and had suffered the following wounds: a shallow incisior

over the left upper chest just beneath the clavical, that was two inches in length, one and one-half inches in width and just beneath the skin; a cut on the back of the right hand; a cut on the surface of the hand; a deep cut over the back; a large cut in the posterior aspect of the lower third of the right arm which measured three inches in length, one-half inch wide and two inches deep, extending to the bone; a large area of bruising that was slightly raised and purple over the left side of the chest; a large bruise internally over the left side of the chest; numerous bruises and abrasions on both sides of the neck, some irregular, and others in a straight line running around to the posterior aspect of the neck; the right side of the lips were swollen and dark purple; dried blood was present in and outside the nose; several scrapes or abrasions were present on the face, one on the right side of the nose and another on the right temple; multiple areas of hemorrhage within the neck muscles; areas of fresh hemorrhaging in the thyroid gland and in the larnyx; one of the angles of the hyoid bone had been broken recently; a rather large abrasion over the back and sacrum; a superficial, one-fourth inch deep cut into the subcutaneous fat on the right chest in the shape of a round puncture; and, a slight abrasion to the right knee; liver mortis was evident; examination of the vagina revealed spermatozoa and it was thought that the victim had sexual intercourse within six hours of death; that the cause of death was manual strangulation although some linear abrasions apparently had been caused by the apron; that the victim was alive at the time of injury to the chest area as reflected by the condition of the resultant bruises; and, that death had occurred more than one day prior to the autopsy.

Appellant was seen driving the victim's automobile by his estranged wife, Ramona, and her girl friend. It was seen in front of the Northwestern Hotel where appellant was staying with Darlene. Later he gave Ramona a pendant watch just prior to the two leaving in the victim's automobile for South Bend, Indiana, on March 3, 1978,

where they stayed for about two weeks prior to appellant's arrest. While there, Ramona had sold the pendant watch at an antique shop.

Detectives Earl Shelton and Francis Reich, of the police department of University City, arrived in South Bend on March 25, 1978, and at 2:00 p.m. were at the police station. They were greeted by a Lt. Mahank who brought appellant to them. After being identified, they informed appellant of the investigation and gave him a Miranda form. Upon request, appellant read "out loud" and acknowledged each right before filling in the date and time on the form and signing his name. Having agreed to talk to the officers, he was shown two photographs of the victim and asked if he had ever seen her. He stated that he did not know the woman depicted therein and had never seen her; that he had never been to the "Some Place Else" lounge; that he did not dance with any white woman; and that he had never seen the pendant watch. When told that his wife had said he had given it to her, appellant then related how he had purchased it for $20 from a man he did not know but who had been introduced to him by one Harold King. After stating that he had never been to the victim's apartment, appellant was advised that his fingerprints had been found therein. Thereafter, he related that he had been in the apartment with his wife, the victim, two other men and two white women; and that the "group partied until about 5:00 a.m." At that time, his estranged wife had said she was a little sick and he had taken her out to the parking lot. Later the two men came out with the "keys" and he and Ramona were taken to the Northwestern Hotel. One of the two men, several days later, attempted to sell him the automobile.

When the officers told appellant they would check with Harold King, he said that would not be necessary as that was not what happened. The third version of the events of the evening of February 18, 1978, were then related to the officers. Appellant said that Darlene, her boyfriend and he went to the "Some Place Else" lounge and the victim was there; that he danced with her and decided to remain when

the two companions left as she promised to take him to his home; that when they left the lounge they drove by to pick up Ramona and the three went to the victim's apartment and began drinking; that he and Ramona were getting high on "reefers" and the victim asked him to go to bed with her; that he turned her down as his wife was in another part of the apartment and the victim began striking him with her open hand. Appellant then stated that he "went off and started striking her and knocked her down." He remembered his wife standing beside him saying, "Let's go." He told the officers that he had wanted to look at the victim and then determined that she was not breathing; that he and his wife searched the apartment; that he took a man's ring, the keys to the victim's auto and the auto itself; that his wife apparently took the pendant watch as she showed it to him the next day, Sunday. When asked if he realized that he was implicating his wife in the murder, he replied, "Yes." He repeated the "factual account" when she was brought into the room, but she emphatically denied the truth thereof when she testified at the trial.

Appellant's fingerprints were taken in South Bend and they were compared with those taken at the crime scene by Officer Donald T. Brian, Supervisor of the Fingerprint Section of the St. Louis County Police Department, and he determined that: a fingerprint lift from a scotch bottle was the left index finger of appellant; the fingerprint lift from the brass bed headboard was the right ringfinger of appellant; a fingerprint lift from the same bottle was the right ringfinger of appellant; and, the fingerprint lift from the cosmetic box on top of the bedroom dresser was the right thumb of appellant.

By an indictment filed on June 12, 1978, appellant was charged with the murder of Pamela R. Benda on or about February 19, 1978. Thereafter, an information having been filed in lieu thereof was withdrawn by the state on September 20, 1979, and the record reflects reinstatement of the original accusatory document. Again, on October 22, 1979, an information in lieu of the indictment was filed which charged appellant with capital murder under §§ 565.001 and

565.008, RSMo 1978. Therein, an allegation was added as a prior conviction that appellant had pleaded guilty to manslaughter and been sentenced to nine years confinement on August 2, 1971. The purpose thereof, as announced by the state, was to bring appellant under the Habitual Offender Act in the event a conviction for a lesser degree of homicide was returned and thereby to authorize the court to assess punishment. Appellant objected to the filing of the substitute information because it contained "endorsed" witnesses who had not been listed on the indictment. The state expressed surprise and stated that all witnesses had been endorsed. However, a review of the "file" reflected that certain names on the information were not on the withdrawn indictment. An off-the-record discussion established that "there had been a second sheet" of witnesses which was not with the indictment by reason of clerical error or otherwise; and that there was no evidence of bad faith or intent to work a disadvantage on appellant by the state. The state advised the court that "full discovery" had been afforded to appellant and "every name ... appears in the police reports." The trial court overruled the objection to the filing of the information and a later request for continuance "to more properly look at the list of witnesses and determine whether the [appellant] has been prejudiced by this endorsement." We have not found a written motion for a continuance in either the legal file or the trial transcript. Nevertheless, we look to appellant's claim that he was denied procedural due process predicated upon an analysis which seeks to balance the private interest affected, the public interest in avoiding an unreasonable burden on the state and the probable effect such safeguards will have on reducing the risk of erroneous decisions. Certainly, in this instance where the death penalty was not only sought but obtained, the "private interest" of appellant is paramount; but, beyond the listing of the broad generalizations noted, appellant advances no tangible argument reflecting any showing of prejudice. Thus, the thrust of appellant's argument seems to be an alleged lack of time to prepare for trial. In response thereto, the state relies

primarily on State v. Strawther, 476 S.W.2d 576 (Mo. 1972), which had facts somewhat similar to this case. Therein "late" endorsement of a witness was upheld over the defendant's vigorous objection due to the absence of any showing "that defendant was thereby prejudiced * * * In the exercise of the court's discretion many factors may be taken into consideration, including whether defendant waived the objection; whether the state intended surprise or acted deceptively or in bad faith, with intention to disadvantage defendant, State v. Glon, Mo., 253 S.W. 364; State v. Lassieur, Mo. Sup., 242 S.W. 900; whether in fact defendant was surprised and suffered any disadvantage, State v. Webb, Mo. Sup., 432 S.W.2d 218, and whether the type of testimony given might readily have been contemplated. State v. Gooch, Mo. Sup., 420 S.W.2d 283." Id. at 579-80. The state submits that none of the factors mentioned in Strawther can be determined adversely against it. As to the matter of intentional surprise or deception, none is shown as the transcript reveals that the witnesses were on a separate piece of paper with the original indictment which inadvertentl was misplaced when the information in lieu thereof was filed. Finally, the state submits that the witnesses were shown in the police reports, were capable of contemplation or were obviously "innocuous." For purposes here, we assume that five new names had been added. The testimony of two of the late-endorsed witnesses went to the identification of the victim's automobile. Since appellant had been seen driving it, he could assume evidence of ownership would be offered--particularly since he claimed no interest therein. The testimony of Ramona, the ex-wife of appellant, identified her as having been married to but separated from appellant during the month of February 1978 (when the crime occurred) and finally divorced from him on January 22, 1979; and, that she had not been a participant in the homicide nor present thereat as she had never been to 6600 Washington and further that, "I don't even know where it is." That she denied any immediate involvement in the crime, after having been implicated for some reason known only to appellant, would not come as any

surprise. Further, for some continuity of thought, we note that her testimony was admissible by the holdings in State v. Damico, 513 S.W.2d 351 (Mo. 1974) and that more recently in State v. Buell, 583 S.W.2d 173 (Mo. banc 1979). Wilbert's testimony only confirmed appellant's story of their being together part of the evening at the lounge and was as innocuous as that of Myrna Savoldi, a friend of the deceased, who only said that the knife shown to her looked like one she had seen a few weeks earlier in the victim's apartment.

Combined with appellant's challenge to the late endorsement of the witnesses as just noted was a further complaint that the notice of the "statutory aggravating circumstances" taken from § 565.012[1] was filed immediately prior to trial. Again, no allegation was asserted nor effort made to show any specific prejudice created thereby; and, although we do not commend the state for being so untimely, we cannot find how appellant's cause was prejudiced in any manner. In fact, the record reflects that neither appellant nor his counsel could articulate a different conclusion. As the record shows, appellant's counsel admitted that on September 20, 1979--a full month before the trial--that the state through its prosecutor had declared an intent to seek the death penalty. The record further accounts for some of the delay being caused by appellant, during most of the time period of interest here, having another capital murder charge pending in the City of St. Louis. It seems agreed that the officials had planned for the City to proceed first so that appellant would not have to be shuffled "back and forth" between the City and

---

1. § 565.012.2(1) Whether the defendant has a substantial history of serious assaultive convictions.

(2) § 565.012.2(4) Whether the defendant murdered Pamela R. Benda for the purpose of receiving money or any other thing of monetary value.

(3) § 565.012.2(7) Whether the murder of Pamela R. Benda involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

(4) § 565.012.2(9) Whether at the time of the murder of Pamela R. Benda the defendant had escaped from the lawful custody of a place of confinement.

County. Later, with the charge in the City "dragging out" it was decided to proceed with the instant case. Furthermore, a brief review of appellant's criminal record is of great significance reference the issue: On August 4, 1971, there were convictions for Manslaughter, Robbery First Degree, Robbery First Degree and Escaping Custody; and thereafter, on September 10, 1979, appellant pleaded guilty to Murder Second Degree, Robbery first Degree and Armed Criminal Action, Escaping Custody and Stealing a motor vehicle and Escaping Custody before conviction. Certainly, the aggravating circumstances as filed could not have come as a surprise to appellant much less his counsel. Under the facts as presented, we find the point without merit as there was no denial of due process of constitutional significance.

Appellant contends that the trial court erred in allowing the state to seek the death penalty as it penalized him for exercising his right to a trial by jury. The argument stems from the record showing that during the summer of 1979 the appellant and state had engaged in "plea bargain" negotiations resulting in a plan for appellant to plead guilty to second degree murder on September 20, 1979. However, he changed his mind and decided to plead not guilty. The prosecutor then formally announced his intention to seek the death penalty, which, as heretofore noted was over a month before trial. There is no indication whatever of vindictiveness on the part of the state, and nothing could be gained by extended consideration of cases thought relevant and cited by the parties. Sufficient guidance may be found in Bordenkircher v. Hayes, 434 U.S. 357 (1978), wherein it was said:

> The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged. Id. at 358.
>
> * * * * *
>
> ... in the "give-and-take" of plea bargaining, there is no element of punishment or retaliation so long as the accused

is free to accept or reject the prosecution's offer.

> While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'--and permissible__ 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' Chaffin v. Stynchcombe, [412 U.S. 17]. Id. at 363.

Appellant, relying on Witherspoon v. Illinois, 391 U.S. 510 (1967), alleges that the trial court erroneously sustained the state's challenges for cause of two veniremen (Nos. 21-36). Although not preserved for appellate review, we consider the argument as made on the basis of "plain error" and find it without merit. The question is not novel and has been considered many times by this Court. Mo. Dig., Jury, Key No. 108. Recent considerations thereof may be found in State v. Newlon, 627 S.W.2d 606, 615 (Mo. banc 1982) and State v. Mitchell, 611 S.W.2d 223, 228 (Mo. banc 1981). Relative to the problem, generally, is this Court's holding in State v. Treadway, 558 S.W.2d 646, 649 (Mo. banc 1977), cert. denied, 439 U.S. 838 (1977), that:

> In determining the qualifications of a prospective juror, the trial court has very wide discretion, and the court's ruling will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion. (citations omitted) All doubt should be resolved in favor of the finding of the trial court because he is in a far better position to determine a challenge for cause than an appellate court. (citations omitted)

The examination produced the following exchanges:

> MR. WALSH: (the prosecutor) ... I want to ask you if there are any of you on this jury panel that have any religious feelings or other feelings or conscience or scruples that would prevent them from even considering the death penalty no matter what the evidence was that you eventually heard?
>
> In other words, that no matter what the situation was, you would never give the death penalty. You just simply do not believe in it....
>
> My point is, though, in this case, upon hearing the evidence and the law, you--the jury function is going to decide; and maybe the decision, based upon the evidence as they hear it and the law that the Court instructs them, and if it got to the point where the law said one of the possibilities for you to consider is the death penalty, could you put aside your own personal feelings in order to consider the death penalty? As a possibility? Or would you automatically rule it out no matter what the evidence was?
>
> JUROR NO. 16: I'm sorry. I really would have to think

about it. I have always felt the death penalty, you know, should be eliminated.

. . . . . .

JUROR NO. 21: I feel the same way.

MR. WALSH: My question then is, after you hear the evidence and the instructions of the law, could you set aside your personal feelings and consider it as a possible punishment in this case?

JUROR NO. 21: Like I said, I just don't believe in the death penalty.

MR. WALSH: Does that mean no matter what the circumstances were, you would not vote to impose the death penalty?

JUROR NO. 21: Unless someone changed my mind. At the moment, no, I don't believe in it.

. . . . . ."

JUROR NO. 36: I also have the feeling I don't believe in the death penalty. I don't believe I could give a sentence like that.

MR. WALSH: You don't believe you could?

JUROR NO. 36: No.

MR. WALSH: You don't believe in any circumstances?

JUROR NO. 36: No.

MR. WALSH: You wouldn't even be able to consider if the Court instructed you on it?

JUROR NO. 36: Well, as far as now. I would say no.

Even a reading of the cold record conveys a belief of the two that they could not impose the death penalty in any case; and, we cannot say that the trial court erred by finding an unequivocal or unambiguous opposition thereto and thereafter sustaining challenges to their participation.

Appellant asserts that a "Witherspoon" death-qualified jury does not represent a fair cross-section of the community and he thus was denied his sixth amendment right to a fair trial. The argument was rejected conclusively in Lockett v. Ohio, 438 U.S. 586, on the premise that an accused does not have a right to be tried by jurors who have indicated explicitly an inability to follow the law and instructions of the court. Further, as said by this Court in State v. Strickland, 609 S.W.2d 392, 397 (Mo. banc 1980):

> The argument that the exclusion of jurors opposed to capital punishment substantially increases the risk of conviction has been continually rejected because the evidence offered in support was considered too tentative and fragmentary. (citations omitted)

Complaint is made that his jury was not fair and impartial because he was allowed only nine peremptory "strikes" while prior to October 1, 1979, he would have had twelve. Initially, we note that the complaint centers around the trial court's act of following the applicable statute. Prior to October 1, 1979, § 546.180, RSMo 1969, gave the defense twelve peremptory strikes and the state six. New § 546.180, RSMo 1979, gives each "side" nine peremptory strikes. As shown by the record, the homicide for which appellant was charged was prior to the change and the trial was after the effective date thereof. He cites no authority for his position but claims the new statute constitutes an ex post facto law. The defendant in State v. Eaton, 292 S.W. 70, 74 (Mo. 1927), presented the same argument which was rejected. Therein, it was said that: "The number of challenges to which the defendant on trial is entitled is purely a procedural matter, and does not constitute a substantial right. In 12 Corpus Juris, 1103, it is said: 'Where a law relates to matters of procedure merely, and does not deprive the accused of any substantial protection, it is not ex post facto. Thus a law changing qualifications, method of selection, and method of impaneling jurors, challenges allowed the accused or the prosecution, * * * is not ex post facto as to offenses committed before its passage.'"

It is contended that the trial court improperly admitted into evidence certain photographs of the victim's body as they were not probative of any material fact. Exhibits #36 and #44 were admitted over appellant's objection and we, again, look to the challenges thereto under the rules pertaining to plain error. In any event, we find both relevant and not "legally" inflammatory. Exhibit #36 is a photo depicting the right-rear plain of the victim's neck and exhibits lateral and parallel bruises consistent with the medical examiner's testimony regarding the cause of death, i.e., manual

strangulation. He also testified that the body exhibited "liver mortis," a discoloration caused by blood settling into the lowest tissues thereof once circulation has ceased, and Exhibit #44 confirmed its presence which tended to confirm the testimony that the victim had died several days before discovery. Nothing has been presented suggesting the trial court ruled erroneously in admitting the photos mentioned.

It is alleged that the trial court erred in sustaining the state's objection to appellant's request that he be allowed to introduce evidence from which the jury might infer that another person may have committed the murder. The evidence tendered presumably would have established that a former boyfriend of the victim, one Leroy McPherson, had an opportunity to commit the crime; that his fingerprints were found in the apartment; that approximately two weeks prior to her death the victim had reported his assault upon her to the police; and, that the police, after the instant crime, had first arrested and later released McPherson. After a hearing thereon, the court ruled the evidence to be too remote in time and irrelevant. In challenging the ruling made, appellant asserts that the evidence against him was all circumstantial and that tendered could have been persuasive. In response, the state submits that there was direct evidence of appellant's guilt, particularly the confession he gave police officers. As said in State v. Ayers, 470 S.W.2d 534, 536 (Mo. banc 1971): "In arguing that the State's case was wholly circumstantial, appellant overlooks the direct evidence provided by appellant's voluntary statements. Appellant's admission that he shot a man ... was direct evidence of his guilt." See also: State v. Spry, 592 S.W.2d 313, 315 (Mo. App. 1979). Under the facts presented, the trial court cannot be charged with error; and, this Court's holding in State v. Umfrees, 433 S.W.2d 284, 287-88 (Mo. banc 1968), appears dispositive of the point:

> Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the

> crime. (citations omitted) The test generally for the admission of such evidence is stated in 22A C.J.S. Criminal Law § 662 b, at page 451, as follows: 'The evidence, to be admissible, must be such proof as directly connects the other person with the corpus delicti, and tends clearly to point out someone besides accused as the guilty person. Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

Argument for discharge of appellant is made, predicated upon allegations that the earlier indictment was defective in failing to accurately specify the statute under which appellant was charged. Such errors, if any, would not dictate the relief requested as the information upon which the trial was had admittedly complied with the law; and even appellant fails to suggest in what respect he could have been prejudiced.

Appellant alleges that § 565.006.2 unconstitutionally limited evidence that he otherwise might have presented by providing that: "In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment ...." The allegation is directed toward the requirement that evidence offered be in compliance with the "laws of evidence." Since appellant offered nothing by way of evidence in "mitigation" the argument is truly academic and is rejected.

Other alleged points of error attack the existing statutory schem for consideration of and assessment of the death penalty in Missouri with arguments recently entertained and fully developed in State v. Mercer, 618 S.W.2d 1 (Mo. banc), cert. denied, 102 S.Ct. 432 (1981); State v. Shaw, ___ S.W.2d ___ (Mo. banc 1982) (No. 62679, handed down August 2, 1982); and, State v. Bolder, ___ S.W.2d ___ (Mo. banc 1982) (No. 62362, handed down July 6, 1982). For the reasons apparent therein, the same lack merit.

Lastly, having considered those errors enumerated by way of appeal, we consider the punishment assessed as mandated in § 565.014.3 (2) and (3).

First, there is nothing in the record suggesting that the sentenc

was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Second, the evidence supports the jury's finding of the specified aggravating circumstances as shown by the admitted prior convictions and "pleas" of appellant. (1) Certainly the state proved that appellant "has a substantial history of serious assaultive convictions by reason of his present conviction being the third for the commission of a homicide plus two others on first degree robbery charges and armed criminal action. (2) "Things of monetary value," i.e., the automobile, man's watch and the pendant watch were taken from the victim. Prior to considering number (3), we note that appellant on the dates in question was an "escapee" from "the lawful custody of a place of confinement" as submitted in (4). We return to number (3) of the aggravating circumstances because it provides the greatest guidance in our effort to comply with the dictates of § 565.014.3(3) in resolving "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The jury by returning an affirmative finding to aggravating circumstance number (3) thereby resolved that the murder of Pamela R. Benda involved "torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman." Without being too redundant, the evidence can be divided into four types of acts. The medical examiner testified that the victim had been severely beaten, as revealed by large and deep bruises about her head and upper chest. She had sustained at least five wounds caused by a sharp instrument. When found, an apron was wrapped around her neck which bore minor linear lacerations, indicating that the murderer attempted to strangle the victim by tightening the apron in a garrate-like fashion. The evidence would show these acts and resulting injuries to have been sustained while the victim was alive. Finally, the medical examiner testified that the murderer manually strangled the victim as shown by the violent internal damage to the

neck, and thus exaggerating the serious physical abuse of the victim prior to her actual death.

Having found the "threshold requirement," i.e., the presence of the statutory aggravating circumstances, the jury considered all the evidence and recommended that the death sentence be imposed on appellant.

After taking into account both the crime and the defendant, we have concluded that the penalty assessed is not excessive or disproportionate to the penalties imposed in similar cases. We have surveyed, again, those cases specifically identified in State v. Shaw, ___ S.W.2d ___ (Mo. banc 1982) (No. 62679, handed down August 2, 1982) and the more recent case of State v. Robert Baker, ___ S.W.2d ___ (Mo. banc 1982) (handed down August __, 1982).

Finding no reversible error, the judgment should be and is hereby affirmed.

J. P. MORGAN, Judge

Donnelly, C.J., Rendlen and Welliver, JJ., concur; Higgins, J., concurs in separate concurring opinion filed; Seiler, J., dissents in separate dissenting opinion filed; Bardgett, J., dissents and concurs in separate dissenting opinion of Seiler, J.

Execution date set for October 16, 1982.

Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Respondent,
vs.
WINFORD L. STOKES,
Appellant.

No. 61963

CONCURRING OPINION

I concur fully in the opinion of Morgan, J., which affirms the judgment of conviction of capital murder and sentence to death.

I file this separate opinion to speak to the reservation of Seiler, J., in dissent, concerning whether "a substantial history of serious assaultive criminal convictions," § 565.012.2(1), RSMo, as an aggravating circumstance, is "unconstitutionally vague."

The dissenting opinion cites Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), in which the Supreme Court of Georgia held that the aggravating circumstance "'The offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions,'" was "too vague and nonspecific to be applied evenhandedly by a jury." Id. at 391-2. The defendant specifically challenged the phrases "substantial history" and "serious assaultive criminal convictions"; however, the court examined only the substantial

history standard. It found that substantiality is a "highly subjective" criterion. Implicit in its cursory discussion seems to be a concern that one jury might find two convictions of Crime A to be substantial while another might find four similar convictions insubstantial.

The court's reasoning is not persuasive because subjective analyses are inherent in every jury deliberation. It is difficult to perceive how the substantiality of a defendant's history is any more subjective than a jury's collective understanding of the reasonableness of doubt. In both cases, individual jurors will likely have their own personal qualitative and quantitative yardsticks against which these standards are measured. In both cases, the jury is compelled to arrive at a group decision on whether the evidence presented exceeds all the individual standards. The court's reservation about this standard is rendered even less persuasive when one considers that it had no difficulty in defining limiting and upholding other standards such as "outrageously or wantonly vile," "horrible" and "inhuman," particularly when these terms are at least as subjective and emotionally provocative.

Reading the entire discussion on this aggravating circumstance leaves one with the firm impression that the Georgia Court was not convinced that this defendant's particular history was substantial, and therefore, this defendant should not be put to death. The court could have reached the same result by exercising its statutory duty in review of the sentence. While the phrase "substantial history" is not measurab with mathematical precision, there does not appear to be much within the realm of jury perceptions that can be so measured. This inability alone would not provide a sound reason for finding this statutory aggravating circumstance unconstitutionally vague, the Georgia Court's reasoning notwithstanding.

ANDREW JACKSON HIGGINS, Judge

Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

vs.

WINFORD L. STOKES,

Appellant.

No. 61963

DISSENTING OPINION

I respectfully dissent and make the following observations: I reserve judgment on the issue whether the statutory aggravating circumstance taken from § 565.012.2(1), "whether the defendant has a substantial history of serious assaultive convictions", is unconstitutionally vague. Appellant raised and argued the point in his brief, but the principal opinion does not discuss the issue, and the facts here do warrant an application of pertinent constitutional tests. However, it should be pointed out that the Georgia Supreme Court, whose lead this court repeatedly follows in death penalty cases, held the "serious assaultive convictions" aggravating circumstance unconstitutionally vague in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

I am unable to agree with permitting the prosecution to get by with not serving defense counsel until the morning of the trial with notice of aggravating circumstances. For the state to seek to take a man's life is a serious matter and we should insist that the state proceed in a fair and orderly fashion. The state knows that it must make known in advance of trial the evidence in aggravation proposed to be introduced. This necessarily means timely notice, and notice

on the morning of trial is not timely. The matter of aggravating circumstances is no trifling matter. Without aggravating circumstances, no death penalty is possible. The defendant is entitled to know what is claimed in this regard. Defense counsel needs time to appraise the state's claim and to prepare to meet it. This cannot be done when notice is not given until the morning of the trial. A remark by the prosecutor a month earlier that he intends to seek the death penalty is no substitute. The prosecutor has to do more than that. He is not bound by such a remark, and he knows that such a remark alone is not sufficient. The defense should not have to speculate on whether or not the prosecutor actually intends to seek the death penalty or whether he is merely using this threat as a negotiating chip for plea bargaining. In this case, for example, just a month before trial the prosecution was ready to accept a guilty plea to a second degree murder charge. Then for some reason the defendant refused to go through with the deal. For all the defense knew, the prosecutor's remark was no more than a threat.

I would make it plain that we will not permit this sort of handling of a death penalty case. It is not imposing any undue burden on the state to require the prosecutor to give a timely notice with respect to aggravating circumstances in cases where the death penalty is sought. Prosecutors can easily comply with this requirement, and I think we should insist on it. We are setting a bad precedent when we give our tacit approval to what occurred here. The principal opinion says that, after all, defendant himself knew about his prior convictions, so that could not have come as any surprise, but in my opinion that will not do as a method of handling the giving of notice of aggravating circumstances. There are fifteen statutory aggravating circumstances and we should not have to decide the matter of notice on the basis of whether the defendant ought to have been aware of what the prosecutor was going to do about specific

aggravating circumstances. That leads only to unnecessary factual disputes. All this would be eliminated if the state were required to act reasonably and give timely notice of what it proposed to do. We should not accept any less where the outcome is to take the defendant's life.

Robert E. Seiler, Judge

APPENDIX B

No. 61963

Circuit Court No. 409734 (Div. 13)

In the Supreme Court of Missouri

September Session, 19 82

State of Missouri, Respondent,

vs.

Winford L. Stokes, Appellant.

Now at this day, the Court has entered the following orders in the above entitled cause:

"Appellant's motion for rehearing overruled."

"Motion for stay of execution overruled.
Execution date re-set for October 28, 1982."

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 19 82, and on the 7th day of October 19 82, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 7th day of October 19 82

Thomas F. Simon Clerk.

Mary Elizabeth McHarney D. C.

CONSTITUTIONAL PROVISIONS

This case involves the application of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, applicable to the State of Missouri by its own terms. The Fourteenth Amendment provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

This case involves the application of the right to assistance of counsel and the right to trial by jury provided in the Sixth Amendment to the United States Constitution. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This case involves the application of the right to maintain a plea of not guilty provided in the Fifth Amendment to the Constitution. The Fifth Amendment provides in part:

> . . . nor shall [any person] be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty or property without due process of law.

This case involves the application of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment be inflicted.

INSTRUCTION NO. 19

In determining the punishment to be assessed against the defendant for the murder of Pamela R. Benda, you must first unanimously determine:

1. Whether the defendant has a substantial history of serious assaultive convictions.

2. Whether the defendant murdered Pamela R. Benda for the purpose of receiving money or any other thing of monetary value.

3. Whether the murder of Pamela R. Benda involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

4. Whether at the time of the murder of Pamela R. Benda the defendant had escaped from the lawful custody of a place of confinement.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

GIVEN
DATE 10/25/79
JOHN R. RICKHOFF
JUDGE

IN THE

SUPREME COURT OF THE UNITED STATES

NO. A-489 82-5989

WINFORD L. STOKES,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

JOHN ASHCROFT
Attorney General

JOHN M. MORRIS III
Assistant Attorney General

NANCY K. BAKER
of counsel

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

Questions Presented

I. Whether the imposition of capital punishment when written notice of aggravating circumstances was given prior to any proceedings in the trial, and the jury did not consider the aggravating evidence on punishment until over three days later, after a hearing, violated petitioner's rights to effective assistance of counsel, trial by jury, to "maintain a plea of not guilty," due process of law and the Eighth Amendment's prohibition against cruel and unusual punishment?

II. Whether the state trial court's exercise of its discretion in permitting the late endorsement of witnesses, whose names defense counsel had been provided with in police reports and whose testimony was susceptible of contemplation or innocuous, when that late endorsement was not the result of any intentional act on the part of the prosecuting attorney, tainted petitioner's conviction by prejudicing his cause, or violating any rights secured to petitioner by Amendments V, VI, and XIV of the United States Constitution?

III. Whether the imposition of capital punishment in the case at bar violated the rule set forth in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), regarding mitigating evidence, and petitioner's due process or equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution, when petitioner requested to offer as evidence in mitigation a prior plea bargain for the instant offense which was inadmissible under the rules of evidence of the State of Missouri?

IV. Whether the imposition of capital punishment in the instant cause violates due process, equal protection or constitutes cruel and unusual punishment following a finding by the jury beyond a reasonable doubt that petitioner has a substantial history of serious assaultive criminal convictions, as permitted by § 565.012.2(1), RSMo 1978, given the evidence presented of petitioner's prior convictions for homicides, armed robberies and armed criminal action?

V. Whether the imposition of capital punishment in the instant case violates due process, equal protection, or constitutes cruel and unusual punishment following a finding by the jury beyond a reasonable doubt that petitioner had committed an offense which was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind, as permitted under § 565.012.2(7), RSMo 1978, given the evidence presented during the guilt phase, and considered by the jury during the punishment phase of the bifurcated proceeding, as to the extent of injuries inflicted upon the victim by the petitioner and the circumstances of the crime?

VI. Whether the imposition of capital punishment in the instance cause violates due process, equal protection or constitutes cruel and unusual punishment following a finding by the jury beyond a reasonable doubt that petitioner committed the offense of capital murder for the purpose of receiving money or any other thing of value as permitted by § 565.012.2(4), RSMo 1978, given the evidence presented of petitioner removing property of the victim following the murder, such as the victim's car?

VII. Whether the imposition of capital punishment in the instant cause following a finding by the jury beyond a reasonable doubt that petitioner was an escapee from custody at the time of the offense as permitted by § 565.012.2(9), RSMo 1978, given the evidence presented in the form of a judgement of sentence and conviction for the offense of escape, which was admissible under the laws of the State of Missouri and would be admissible under the federal rules of evidence?

VIII. Whether the imposition of capital punishment in the instant cause violates the petitioner's right to equal protection of the law and constitute cruel and unusual punishment by having the sentence imposed upon him affirmed by the Supreme Court of Missouri in the same procedural manner as this court has passed upon for the State of Georgia, and whether the procedure in the State of Missouri is sufficient to guard against arbitrary or capricous imposition?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions Cited

Rules of Procedure Cited

Secondary Authorities Cited

STATUTORY PROVISIONS

The Missouri statutory scheme for imposition of death penalty is comprised of several statutes. § 565.006, RSMo 1978, provides in pertinent part as follows:

> "...2. Where the jury or judge returns a verdict or finding of guilty as provided in Subsection 1 of this section [finding of capital murder], the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hearing additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolle contendre of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible....In capital murder cases, in which the death penalty may be imposed by a jury or a judge sitting without a jury, the additional procedure provided in § 565.012, shall be followed..."

Section 565.008, RSMo 1978, provides that:

> "1. Persons convicted of the offense of capital murder shall, if the jury were so recommends after complying with the provisions of Sections 565.006 and 565.012, be punished by death."

Section 565.012, RSMo 1978, delineates the circumstances under which capital punishment may be imposed. In pertinent part, it reads as follows:

> "1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions for the jury to consider:
>
> (1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,
>
> (2) Any of the statutory mitigating circumstances enumerated in Subsection 3 which may be supported by the evidence.
>
> (3) Any mitigating or aggravating circumstances otherwise authorized by law.
>
> 2. Statutory aggravating circumstances shall be limited to to the following:
>
> (1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious and criminal convictions;...
>
> (4) The offender committed the offense for capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;...
>
> (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved

torture, or depravity of mind;...

(9) The capital murder was commited by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;...

(11) The capital murder was committed while the defendant was engaged in the perpetration or attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;...

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed."

Section 565.014, RSMo 1978, places upon the Missouri Supreme Court the duty to review all death sentences. Section 3 of the statutory provision provides in part as follows:

"3. With regard to the sentence, the Supreme Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(2) Whether the evidence supports the jury's or judge's findings of a statutory aggravating circumstances and enumerated in § 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The offense of first degree murder in the State of Missouri is defined by § 565.003, RSMo 1978, and encompasses the following conduct:

> "Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the prepetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or kidnapping."

The offense of capital murder is defined in § 565.001, RSMo 1978, as follows:

> "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

STATEMENT OF THE CASE

At the outset, respondent takes exception to the continuous barrage of misstated facts and insults directed to the State of Missouri, St. Louis County Prosecutors, and Missouri courts, trial and appellate, which find no basis or support in law or fact. One example of petitioner's apparent attempt to mislead this Court is his suggestion that he languished in jail for over a year before counsel was appointed when he is aware of his representation by counsel, on a capital murder in the City of St. Louis, Missouri, and any delay in appointment of counsel in the instant murder was occasioned by the proceedings in the City of St. Louis, Missouri on that capital murder and related charges. A cursory review of the record in this cause will establish that the State, its prosecutors and courts have acted in an appropriate and constitutional manner in each step of the proceedings as dictated by this Court. No further response shall be made to misstatements except as necessary in the argument portion of this response as the record speaks for itself.

Charges against the petitioner arose out of the following events: On February 18, 1978, a Saturday, the petitioner was staying with one Darlene McCauley at the Northwestern Hotel in St. Louis City, Missouri on Natural Bridge Road. Petitioner joined Darlene and her boyfriend, Wilbert Daniels, to go to a bar. Daniels met with Darlene and the petitioner at approximately 3:00 p.m. on that date and the three had dinner at the Heritage House, they then went to a bar called

"Some Place Else", arriving between 8:30 and 9:00 p.m.. They secured a table close to the dance floor, ordered drinks, and Daniels danced with Darlene. When later orders for drinks were delayed, petitioner went to ask the waitress to come to the table, he was later seen dancing with the victim, Pamela Benda, of University City, Missouri. Miss Benda returned to the table with petitioner and introduced herself. She joined the group and they imbibed several rounds of drinks. At 11:30 p.m., Daniels and Darlene were prepared to leave and announced they would have one last drink. The petitioner and Daniels went to the restroom together and petitioner informed Daniels that he would catch a ride home with Miss Benda. Upon returning to the table, Miss Benda confirmed this arrangement. Petitioner remained with Miss Benda as Darlene and Daniels left. Ramona Tabron Stokes, then petitioner's wife, was not with the threesome that evening.

On that same date, February 18, 1978, the record established that Miss Benda had recently rented an apartment at 6600 Washington in the City of University City, Missouri, specifically apartment 303. Between 2:30 and 2:40 a.m., on the following Monday, Officer David Kloeckener, of the University City Police Department was summoned to 6600 Washington, where he was met by a Mr. Aburto (the manager of the apartment building), and Mr. Hunsicker, (a maintance man). Officer Kloeckener had responded to a call for a possible sudden death. The manager unlocked the door to apartment 303 and motioned Office Kloeckener to a back bedroom where he discovered the nude body of Ms. Benda

with a pillow over its face. Officer Kloeckner then summoned other officers to the scene.

Detective William Kranz, of the University City Police Department, responded to Officer Kloeckener's call. He examined the scene and found it in a disarray with a nude body in the bedroom. Photographs of the scene were taken and the apartment was dusted for fingerprints. Several items of physical evidence were seized. Fingerprints were recovered from an ornamental brass headboard, a cosmetic box on the dresser, a closet door in the south bedroom, and from a Whitmore Scotch whiskey bottle on the floor. Certain items were also seized from the commode in the bathroom.

An autopsy was performed on the victim's body on February 22, 1978, at 7:00 a.m. by Dr. Eugene Tucker, a pathologist in the Office of the Medical Examiner of St. Louis County, Missouri. It was discovered during the autopsy that the victim's body had already passed through rigor mortis The victim weighed 110 pounds and was 5'2" tall. Dr. Tucker discovered the following wounds during his examination of the body. A shallow incision, over the left upper chest just beneath the clavical, approximately 2 inches in length, one and one-half inches wide, and just cut beneath the skin; a cut on the back right of the hand; a cut on the surface of the hand; a deep cut over the back of the victim; a large cut in a posterior aspect of the lower third of the right arm which measured three inches in length, one-half inch wide, and two inches deep extending to the bone; a large area of bruising that was slightly raised and purple over

the left side of the chest; a large bruise internally over the left side of the chest; numerous bruises and abrasions on both sides of the neck, some irregular, a number of odd-shaped bruises, and also bruises in a straight line running around the neck and posterior aspect of the victim's neck; the right side of the victim's lips were swollen and dark purple; dried blood was present in, and outside of, the nose; several scrapes or abrasions were present on the face, on the right side of the nose and another on the right temple; multiple areas of hemorrhage within the neck muscles; areas of fresh hemorrhaging in the thyroid gland; areas of hemorrhaging in the larynx; one of the angles of the hyoid bone had been recently broken; abrasions over the back and over thesacrum, which was a "rather large abrasion"; a superficial one-fourth inch deep cut into the subcutaneous fat on the right chest in the shape of a round puncture; and a slight abrasion to the right knee. The body showed evidence of liver mortis, which develops as the blood settles or sinks toward the lower portion of the body. An examination of the victim's vagina resulted in the discovery of a "slight amount of whitish-grey material", which, upon being tested, was found to contain numerous spermatozoa. Enzyme studies were conducted and indicated the presence of enzymes associated with seminal fluid. Nine milligram percent of alcohol was found in the victim's urine. Dr. Tucker testified that, in his opinion, and based upon his examination of the body, the cause of death was due to manual strangulation although an apron had been applied to the neck, as indicated by linear

abrasions. The cuts appearing on the victim were fresh, and the victim had been dead more than 1 day at the time of the autopsy. The examination of the vagina, and the presence of spermatozoa, indicated that the victim had had sexual intercourse sometime within six hours of death. The injury to the left area of the chest was received while the victim was alive as the condition of the resultant bruise could only have been achieved by the action of the heart's pumping.

Evidence was also adduced that the petitioner was seen driving the victim's brown duster prior to his leaving for South Bend, Indiana, on March 3, 1978, by his then wife, Ramona Tabron (Stokes) and her girlfriend. Ms. Tabron last saw this automobile in February 1978, in front of the Northwestern Hotel where the appellant was staying with Darlene. The appellant gave to Ms. Tabron a watch pendant during February, just prior to the couples' leaving for South Bend, Indiana. Miss Tabron and petitioner left for South Bend, on or about March 3, 1978, and stayed for about two weeks prior to the appellant's arrest. Ms. Tabron had sold the pendant to a lady who owned an antique shop in South Bend, Indiana.

Two University City detectives, Earl Shelton and Frances Wright, traveled to South Bend, Indiana, and were permitted to speak to the petitioner after having been met by a Lt. Mahank of the South Bend Police Department. The two officers arrived in South Bend at approximately 2:00 p.m. on March 5, 1978. Petitioner was brought to the detectives to speak to them as they had a "pickup order" out for the petitioner.

Petitioner was given his Miranda rights in the form of a written document (Exhibit No. 53), which he signed, filling in the date and time as well as an acknowledgement of each right.

Petitioner, when brought to the officers at the South Bend Police Department stationhouse, was informed of the investigation. He read out loud and acknowledged each right on the form and then signed it. Petitioner agreed to talk to the officers and was shown two photographs of the victim and asked if he had ever seen her before. Petitioner said that he did not know the woman in the photograph. When asked if he had ever seen her before, he stated that he had not. When asked if he had been at the lounge "Some Place Else" and danced with a white woman, he said he'd never been to the lounge and did not dance with "any white woman".

Petitioner was then shown the pendant and stated that he had never seen it before. When informed that his wife had told the officers that she had received the watch from the petitioner, he denied it. Petitioner continued to deny that he knew anything about the watch, but then suddenly stated that he had seen the watch and purchased it in St. Louis for a sum of $20.00 from a man he did not know in the last part of February or early part of March. He said he purchased the watch in a hotel room and his wife was a witness. The petitioner told the officers that a Harold King had introduced him to the man who sold him the watch.

Upon further questioning, petitioner denied that he had ever been in the victim's apartment. When told that his

fingerprints had been found in the victim's apartment, the petitioner admitted that he had been to the apartment at that particular time. He stated that on a weekend night, he, Darlene McCaulley, his wife , and a "Bill" were in an apartment in a hotel in St. Louis. He stated that they all decided to go to some lounges, but his wife did not want to go. Miss Tabron was dropped off at her mother's and the threesome traveled to the "Some Place Else" lounge. At this lounge, the petitioner met and danced with the victim. Petitioner left with the victim separate from Darlene and Bill at closing time. The petitioner also told the police that the victim had said it was okay to go pick up his wife even though she had asked, "Your place or mine?", petitioner's wife came out of the residence where they picked her up with two men that the petitioner did not know. They all got into the car with the victim and went to a big building. Petitioner stated that the victim made a call from her apartment and, about seven minutes later, two white women arrived and the group partied until about 5:00 a.m. At that time, Miss Tabron said that she was a little sick so the petitioner took her downstairs and out back of the building to the victim's car. As this car was unlocked the two got inside to get out of the cold. Petitioner told officers that about 30 minutes passed and the two men came out, one with the keys to the car. They got inside and drove petitioner and his wife to the Northwestern Hotel where they were dropped off. Petitioner also stated that the next day (Sunday) one of the

men came back and asked if he wanted to keep the car for a few days, giving petitioner the keys. Petitioner drove the duster automobile a few days until the man returned. He told officers that this man had attempted to sell the car several days later, but petitioner refused to buy.

When petitioner was told by officers that they would check his story with Harold King the petitioner said that would not be necessary as that was not what happened. He then told a third version of the events of the evening of February 18, 1978, which was as follows: Darlene, her boyfriend and petitioner went to a lounge, but Ramona would not go with them so she was left at the apartment. The three went to the Some Place Else Lounge, and, again, the victim was already there. Petitioner spoke with her and danced with Ms. Benda, deciding to remain with the victim when his two companions stated they were going to leave. The victim said she would take the petitioner back to his home in the City. After Darlene and her boyfriend departed, the victim and the petitioner drove to the hotel where they picked up the wife, and all three drove to the big building, again going into the victim's apartment where they began drinking. Petitioner stated that he and his wife were getting high on "reefers" and the victim asked the petitioner to go to bed with her. Petitioner said that he turned her down as his wife was in another part of the apartment, and the victim began to strike him with her open hand. Petitioner then stated that he "went off" and started striking her and knocked her down. He did not recall what he did next, but

that his wife was standing beside him saying, "Let's go." He told officers that he wanted to look at the victim and determined that she was not breathing. He stated then that he and his wife searched the apartment, he taking a man's ring, and the keys to the victim's auto as well as the auto itself. He stated his wife apparently took the watch because she showed it to him the next day Sunday. Petitioner said that he sold the man's ring, and, although he intended to give the watch to Darlene, decided to "give it" to his wife. He stated that he left the victim's automobile at the hotel. When asked if he realized he was implicating his wife in murder, petitioner replied yes. He was asked to repeat his statement before his wife following her being giving the Miranda rights form and signing it. Ramona Tabron denied the truth of the statement when she testified at trial.

Fingerprints taken from the petitioner in South Bend, Indiana, were compared to several fingerprint lifts from the apartment taken on February 22, 1979. It was determined that the fingerprint lift from a scotch bottle was the left index finger of the appellant; the fingerprint lift from the brass bed headboard was the right ring finger of the petitioner; a fingerprint left on the Scotch bottle was the right ring finger of the petitioner; and the fingerprint lift from the cosmetic box on the top of the bedroom dresser was the right thumb of petitioner.

The petitioner adduced no evidence in his own behalf in the guilt phase of this trial.

Prior to the submission of the case of the jury and out of its hearing and presence, the applicability of Missouri's Habitual Offender Act was determined in the event the jury returned a verdict of guilty of a degree of homicide less than capital murder. The jury retired to consider its verdict on October 24, 1979, and returned a verdict of guilty of capital murder on that same date. The jury was polled, and each member of the jury responded that the verdict was his own. The court then stood in temporary recess, until the following morning, October 25, 1979, for the second phase of the bifurcated trial proceeding.

During the second phase of the trial, the state adduced evidence of prior convictions of appellant, namely appellant's conviction of manslaughter (Exhibit 24); appellant's guilty plea to murder second degree and robbery first degree (Exhibit No. 76); petitioner's plea of guilty of escape before a conviction (Exhibit No. 77); petitioner's guilty pleas to robbery first degree and armed criminal action (Exhibit No. 78); and petitioner's conviction for robbery first degree by means of a dangerous and deadly weapon (Exhibit 79). The petitioner presented no evidence on his own behalf although prior to the commencment of the second phase he had requested of the trial court whether or not he could bring in the plea agreement which had not been carried out by the petitioner on September 20, 1979. This was denied. On appeal, petitioner complained of not being permitted to introduce evidence of another's motive and opportunity to murder Ms. Benda. No complaint on appeal was made of the ruling to murder Ms. Benda.

No complaint on appeal was made of the ruling regarding the plea arrangement.

After closing arguments of the parties, the jury retired at 12:05 p.m. to their deliberating room. At 1:40 p.m., the jury requested the exhibits having been introduced as new evidence in the second phase. These were provided to the jury, and the jury returned with the verdict, fixing petitioner's punishment at death and finding four aggravating circumstances, specifically: (1) that the petitioner had a substantial history of serious assaultive convictions; (2) that petitioner murdered the victim for the purpose of receiving an item of monetary value or money; (3) that the murder of the victim involved torture or depravity of mind, and as a result thereof, it was outrageously or wantonly vile, horrible, or inhuman; and (4) that the petitioner had escaped from the lawful custody of a place of confinement, at 3:05 p.m. on that same date. As already noted, petitioner's motion for new trial was overruled and he was sentenced to death in accordance with the jury's assessment on January 17, 1980. Petitioner prosecuted an appeal to the Missouri Supreme Court which then affirmed his conviction on August 31, 1982. His rehearing was denied on October 7, 1982, by that court. (Petitioner for writ of certiorari Appendix A). Petitioner now seeks a writ of certiorari in this court.

ARGUMENT

I.

The following claims of petitioner are raised for the first time in his petition for a writ of certiorari: that his guilty pleas to murder second degree, armed robbery and escape are invalid and inadmissible, that he was not permitted to introduce as mitigating evidence a plea agreement, and effective assistance of counsel. Thus respondent suggests that this court should not entertain these grounds.

The judgement of death imposed upon petitioner DID not violate petitioner's right to effective assistance of counsel, trial by jury, "maintain a plea of not guilty", due process of law in the Eighth Amendment's prohibition against cruel and unusual punishment as petitioner was given sufficient written notice of aggravating circumstance evidence to be presented at trial as three days passed before any instruction on aggravating evidence was given to the jury, before the second phase of the bifurcated proceeding commenced there was an evening recess which would have permitted petitioner an opportunity to rebut any evidence which he felt necessary to rebut, no secret information was used in obtaining the sentence of death against petitioner, petitioner had been informed a month in advance that the state was going to seek a death penalty, and each item of evidence introduced in aggravation of punishment was such that petitioner cannot say that he was surprised in the legal sense of the word nor prejudiced as he was aware of each item of evidence.

In his petition for certiorari, petitioner complains about the type of notice he was given of aggravating circumstance evidence. Petitioner received formal notice of the aggravating circumstances prior to any proceeding in his trial. The type of notice is not disputed here, nor was it disputed at any time in the courts below in the State of Missouri. The petitioner desired, apparently, more notice than he received. However, petitioner does not show any prejudice because of the lack of such additional notice, or of what benefit, if any, additional time would have been to him. The statutory scheme in Missouri, as outlined under statutory provisions set forth supra, requires that notice be given prior to trial. Notice was given prior to trial and petitioner was afforded the opportunity to rebut evidence throughout the entire trial, including both phases, as said evidence was offered. This petitioner chose not to do which is his right. Also, petitioner was permitted to "maintain" a guilty plea and was tried before a jury. Respondent fails to see how these rights have been infringed.

Petitioner suggests that the circumstances in the instant case are no less egregious than those presented in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in which the death sentence had been imposed upon the petitioner on the base of confidential, secret information and the presentence report which was not disclosed to counsel or the defendant at any time. They were not given an opportunity, at any time, to refute or deny the contents of that report. Respondent suggests to this Court that petitioner's reliance

upon Gardner v. Flordia is misplaced as Gardner v. Florida has been cited and relied upon for the proposition that there must be an opportunity to rebut evidence in aggravation and such nondisclosure violates due process and the Eighth Amendment prohibition against cruel and unusual punishment and that Gardner v. Florida's holding prohibits the use of "secret information," Proffitt v. Wainwright 685 F.2d 1227, 1254, (11th Cir. 1982).

The instant cause is not the type of case as was presented to this court in Smith v. Estelle, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), affirming Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), in which the prosecuting attorney had intentionally omitted the crucial witness from the list of those to be used in the penalty phase and had given defense counsel nothing which they could use to cross-examine the expert witness. Because of the surprise and disadvantage worked by the evidence presented at the time of the penalty phase of the proceedings, the Fifth Circuit found that there was no reliability in the penalty phase and reversed the sentence.

In the instant cause, petitioner was informed three days before the penalty phase of what evidence would be used in aggravation. Petitioner has never denied that the judgements offered of convictions were his, and has advanced for the first time in his petition for certiorari that the validity of some of those judgments, used in aggravation, depended upon a negotiated settlement and that the judgements are invalid. As petitioner is aware, the State was willing and ready to go

through with its negotiated settlement. However, petitioner demanded a jury trial after having accepted the benefits of his bargain by having the capital murder charge in the City of St. Louis, Missouri, reduced to murder second degree with a term of years. Petitioner demanded a jury trial in this particular capital murder case and has never attacked the validity of his pleas entered in the City of St. Louis, although represented on appeal by a different attorney.

It is also obvious that, whether or not the State was willing to reduce the charge against the petitioner in a murder second degree, is irrelevant as to whether or not notice as to evidence in aggravation was not given properly. Indeed, as this Court has previously held, it does not violate any constitutional rights of a defendant to try and have him convicted of a greater offense that that offered in a plea bargain, with a more severe sentence. Bordenkirchner v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Since there is no per se rule against encouraging guilt pleas, Corbett v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), respondent suggests that all claims of petitioner that the fact that the plea bargain was offered is irrelevant as to whether or not the imposition of capital punishment in the instant case was arbitrary or capricious as it is not the prosecutor who imposes the sentence of death, but rather a jury following a statutory procedure which is similar, if not identical, to that scheme and procedure previously examined by this court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Also, no secret evidence was used against this petitioner. What was used were prior convictions of which he certainly had notice. This is not a case of pre-prosecution vindictiveness as petitioner was well aware of what would occurr if he did not plead guilty to murder second degree in the St. Louis County capital murder case. Thus, no constitutional right of petitioner was infringed upon by the state attorney. United States v. Mauricio, 685 F.2d 143 (5th Cir. 1982), (reversed dismissal of indictment for vindictiveness as defendant aware of consequences if plea agreement fails).

Additionally, respondent would suggest that the claims contained in the argument I portion of petitioner's petition for writ of certiorari are irrelevant to the question presented as to whether or not sufficient notice of a gravating circumstance evidence was given. This is particularly so with petitioner's allegation that there was no fair warning that he was facing a capital offense after having negotiated a plea to have the capital offense reduced to murder second. (Petition at page 7). As petitioner had a jury trial, petitioner's attorney effectively cross-examined all witnesses presented by the state and could not have rebutted the evidence of the convictions as they were petitioner's own, petitioner received the second phase hearing on his punishment after three days notice of the evidence which would be used against him, and the procedureal safeguards set forth by this Court were followed, respondent suggests that petitioner has suffered no violation of his federal constitutional rights which would justify a granting of a writ of certiorari for the review of his sentence of death.

II.

The judgement of death is not violative of petitioner's constitutional rights as secured by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by the late endorsement of 25 witnesses, only five of whom were called to testify, as the testimony adduced through the mouths of the newly endorsed witnesses was susceptible of contemplation or innocuous and there was no element of surpise nor substantial or significant factor in this case brought about by the testimony of these witnesses which was not previously disclosed to defense counsel through discovery.

In his second point under which petitioner requests that a writ of certiorari be granted, petitioner alleges that the state trial court improperly refused to allow a continuance which was unopposed by the State. First, respondent would suggest that trial court exercising its discretion in whether or not to grant a continuance is not a matter for federal review as this is a procedural matter to be considered by the state courts. Secondly, petitioner must show some type of prejudice as the result of any late endorsement without a continuance. This is the standard applied in federal prosecutions when there is a late endorsement of witnesses. See McClendon v. United States, 587 F.2d 384 (8th Cir. 1978), cert. denied 440 U.S. 982, (1979) (error in administering discovery rules not reversible absent material prejudice due to late endorsement of witnesses).

In McClendon v. United States, supra, defense counsel moved for a continuance that he could prepare to meet the testimony of late endorsed witnesses. As there was no element of surprise, and the testimony of which he would not have known prior to trial was not substantial or a significant factor in the case, no reversal was required. So too was the ruling in United States v. Duhart, 496 F.2d 941 (9th Cir. 1974), cert. denied 419 U.S. 967 (1974) (no prejudice for failing to comply with statute to supply list of witnesses in capital case if have knowledge going to be called and what they will say). In United States v. Duhart, defense counsel knew the testimony to be produced from witnesses due to police reports and information he had received in discovery.

In the case at bar, it is not disputed that petitioner's counsel had received every name endorsed as a late witness in police reports. Defense counsel's motion for a continuance, which was requested after several other pre-trial motions were filed by him and ruled on by the court following the filing of the late endorsement, was denied as they were currently in trial and were ready to go to trial. The list of additional witnesses was shown to have originally been attached to an earlier charging document but had been left off that document through a court employee's clerical error. There was no dispute at trial, nor on appeal, that any bad faith was involved on the part of the state. Any claim of bad faith is raised for the first time in petitioner's petition for writ of certiorari.

The Supreme Court of Missouri considered the question as if only five witnesses had been endorsed as the result of an earlier holding in State v. Ross, 507 S.W.2d 348 (Mo. 1974), in which it was determined that an endorsement of a witness, who is not called to testify at trial, who does not result in any prejudice to an appellant's rights and does not entitle him to a reversal of his conviction. In the case at bar, only five of the late endorsed witnesses testified, specifically, Lucy Malone, Ramona Tabron Stokes, Myrna Savoldi, Robert Benda, and Wilbert Daniels.

The first witness to testify, who was called twenty-four hours after the filing of the new accusatorial document with the list of witnesses on it, testified regarding the ownership of the victim's car and identified the car from the photograph, as did Mr. Benda, the victim's former husband. Both witnesses were cross-examined by the defense counsel regarding the ownership of this vehicle. Wilbert Daniels testified about being at the Someplace Else Lounge with the petitioner at the time that he met the victim. The testimony regarding the ownership of the victim's car as well as the date and time at which petitioner met the victim should have been readily contemplated by petitioner as these facts were contained in his confession to the police.

Myrna Savoldi testified as to having seen a knife similar to a knife found in the commode of the victim's apartment. She was cross-examined by petitioner's counsel and admitted that she could not identify the knife. Thus, petitioner was able to meet this woman's testimony.

With respect to his former spouse, Ramona, petitioner cannot seriously state that he did not contemplate or expect that Ms. Tabron would be called to testify as immediately after the substitute information was filed, his counsel filed a written motion to strike the testimony of Ms. Tabron as having been married to the petitioner at the time of the commission of the offense. Obviously, as the motion had been prepared, counsel expected this testimony to be introduced and could not have been surprised or disadvantaged by same. Respondent suggests to this Court that petitioner was in no way prejudiced by the exercise of the discretion of the trial court in first permitting the late endorsement of witnesses and denying a continuance as his attorney was able to cross-examine these witnesses, should have expected this testimony to be admitted, this testimony was in every way cumulative to that of officers testifying about petitioner's confession and what was contained therein, and he actually expected Ramona Tabron to be called as a witness as he had already prepared a written motion to strike her testimony.

Petitioner is correct in his assertion that Hall v. United States, 410 F.2d 653 (4th Cir. 1969), cert. denied 396 U.S. 970, 90 S.Ct. 455 (1969), contains a statement that, generally, in a capital case, failure to provide a list of witnesses is ordinarily reversible error. However, Hall v. United States was not reversed. Rather, there it was noted that "the purpose for which the list is usually required was otherwise met..." in that case as defense counsel had the

transcript of the witnesses testimony from a prior trial. Therefore, he was "not suprised and denied an opportunity to prepare to examine witnesses and meet their testimony." The purpose of the rule to provide a list of witnesses is to avoid surprise. As there was no surprise or prejudice to the appellant Hall's case, his cause was not reversed. Just as in Hall v. United States, petitioner was aware of the type of testimony to be introduced by these witnesses and was in no way prejudiced by any late endorsement. Thus, a writ of certiorari should not be granted as a result of this claim.

III.

The judgement of death is not violative of any of petitioner's constitutional rights as it was not imposed in violation of the rule set forth in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), as the evidence offered in mitigation by petitioner, a prior plea bargain for the instant offense which was inadmissible under the rules of evidence of the State of Missouri, did not prohibit him from introducing any evidence relating to his character or any of the circumstances of the offense that the peittioner wished to proffer as a basis for a sentence less than death.

Petitioner suggests that an offer of a plea negotiation is evidence of mitigation for purposes of avoiding the imposition of the death sentence. Respondent suggests that this position would result in no offer of a plea bargain to any defendant faced with the possiblity of a death sentence and is inappropriate evidence to "mitigate" the type of

punishment which a defendant's character, or record, or circumstances of the offense would dictate he should receive under the Missouri statutory scheme for imposition of the death sentence. Respondent contests petitioner's assertion that the jury would consider an offer of a plea agreement as a mitigating circumstance as sufficient to preclude the ultimate penalty of death. Rather, respondent would suggest to this Court that the fact that petitioner was willing to plead guilty to a lesser offense without the benefit of trial would have the opposite result--the jury would think that the petitioner was guilty and any possible doubt of guilt would be removed from their minds.

The public interest would best be served by not interfering with the role of the plea bargain in criminal prosecutions by requiring that any offer of a plea bargain be told to the jury. Respondent suggests to this court that Missouri statutory scheme requiring only that mitigating evidence be admissible under the rules of evidence ensures the reliability which petitioner demands in the sentencing phase of his bifurcated proceeding. Lockett v. Ohio, supra, only requires that evidence of his character, record, or circumstance of the offense that would be a basis for sentence less than death be admitted. A plea negotiation entered into because of a crowded criminal docket or because the defendant himself might request the possibility of a plea bargain is irrelevant to his character or record or any circumstance of the offense and is therefore improper mitigating evidence standing on its own. Additionally, this evidence is inadmissible under

the rules of evidence of Missouri, State v. Beal, 470 S.W.2d 509, 514 (Mo. banc 1971), (the State of Missouri has ruled that pretrial negotiations are inadmissible for any purpose unless the defendant subsequently enters a guilty plea or a plea of nolle contendre). Petitioner's plea negotiation was inadmissible.

Respondent suggests to this court that rulings on evidentiary grounds are not normally reviewable in a federal proceeding and do not present a federal question. Oliphant v. Koehler, 549 F.2d 547 (6th Cir. 1979). Respondent suggests to this court that it is entitled to require reliability in mitigating evidence the same as the defendant is entitled to require reliability in the evidence of aggravation.

IV.

The judgement of death is not unconstitutional nor was it imposed in an arbitrary or capricous fashion, as the jury's verdict form specifically set out an aggravating circumstance enumerated in § 565.012.2(1) 10, RSMo 1978, which was found by the jury beyond a reasonable doubt, after being presented with admissible evidence of petitioner's prior convictions, including, certain offenses to which he had pled guilty on September 20, 1979.

Petitioner suggests that the aggravating circumstance of substantial history of assaultive criminal convictions, as provided for in § 565.012.2(1) RSMo 1978, is too vague and nonspecific to be applied "evenhandedly by a jury." Respondent suggests to this court that this is just the type of aggravating circumstance that guides the jury and informs

them to consider the record of the particular defendant.

Petitioner has never at any time, in any court of the State of Missouri, attacked the validity of his guilty pleas entered prior to this trial and which were a part of the negotiated plea settlement which he declined to enter when in the St. Louis County Circuit Court although he now does so. Petitioner refused to plead guilty to an offense in St. Louis County following his guilty pleas in the City of St. Louis, did not render those earlier pleas of guilty invalid.

Petitioner is incorrect in stating that he had only the following admissible history: "A manslaughter conviction and a robbery conviction in 1971". Petitioner had a substantial history under any definition of that word. Petitioner had just been convicted of his third homicide offense, having been found guilty of every degree of murder in the Missouri statutory scheme except first degree. Petitioner had numerous robbery convictions as well as armed criminal action. An individual who has committed three homicides, numerous armed robberies and armed criminal action is certainly one with a serious assaultive criminal conviction history. Respondent suggests to this court that this aggravating circumstance is not highly subjective and is one of the aggravating circumstances which is more easily applied to a particular defendant's records and is sufficient to guide a jury's determination on the question of punishment.

Respondent suggests further that the aggravating circumstance of substantial history of assaultive criminal convictions is not vague and does not need a more distinct definition despite the holding of the Georgia Supreme Court in Arnold

v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976). In Arnold v. State, the Georgia court looked to Black's Law Dictionary for a defintition of what "substantial" was. They found it defined there to mean something of value or real worth and importance. Id. Respondent suggests to this Court that the lay mind, which is what would be present in the jury box would not use the definition contained in Black's Law Dictionary, but would rather use the common meaning of the word such as would be found in a Webster's dictionary. The New World Dictionary, second college edition, defines substantial as having substance, real, actual and true and not imaginery, strong, solid, firm, stout, considerable, ample and large, as well as the definitions of considerable worth or value in having property or possessions. Clearly, the lay mind would understand substantial in the context of the aggravating circumstance to mean considerable, ample, real, actual, true and not imaginery. Respondent suggests to this Court that two prior homicide convictions, as well as several armed criminal actions, is indeed a "substantial" history as that description would be viewed by the lay juror's mind. This is certainly an ample or large amount of criminal convictions involving assaults upon other human beings. This is not a too vague and non-specific aggravating circumstance to meet constitutional muster.

V.

The judgment and sentence of death imposed against petitioner is not violative of any constitutional right preserved to him by the United States Constitution as the aggravating circumstance that the "offense was outrageously,

or wantonly vile in that it involved torture or depravity of mind" is not unconstitutionally vague or overbroad as it sufficiently guides and focuses the jury's objective consideration to the individual offense and the indivdual offender before it and has been interpreted by the Missouri Supreme Court in a constitutional manner.

Petitioner alleges, just as under argument 4 of his petition, that the aggravating circumstance contained in subsection 7 of § 565.012.2, supra, is unconstitutionally vague. This particular aggravating circumstance has already been reviewed by this Court in Gregg v. Georgia, supra. As is noted in Gregg v. Georgia, permitting the jury to act within the current statutory language alone, without further definition will permit a lein to be maintained between contemporary community values and the judiciary, without which the imposition of punishment will cease to reflect evolving community standards. Gregg v. Georgia, __ U.S. __, 190 (discussing importance of role of jury in capital sentencing procedures). As pointed in Gregg v. Georgia, supra at 201, this court is permitted to alloco state court's the opportunity to define and narrow further the aggravating circumstances. Such has been done by the Missouri Supreme Court given this particular aggravating circumstance. As may be seen by a review of the opinion of the Supreme Court in the instance cause, it lists, just as the Georgia Supreme Court does, those cases which are found to be similar and which it compared to the instant cause. State v. Stokes, 638 S.W.2d 715, 724 (Mo. banc 1982). It has been the consistent procedure followed

by the Missouri Supreme Court. State v. Mercer, 618 S.W.2d 1 (Mo. banc 1981), cert denied ___ U.S. ___ (1981); State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982) and State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982). Specifically, the Missouri Supreme Court in great detail described the injuries inflicted upon Pamela R. Benda, which were inflicted while the victim was still alive. As the victim was repeatedly cut, often deeply, bruised and strangled, the crime was considered to be of an outrageous and horrible nature. The Supreme Court of Missouri has followed the procedure which was found constitutional by this Court in Gregg v. Georgia, supra. Respondent suggests that petitioner is not entitled to a writ of certiorari on this aggravating circumstance.

VI.

The judgement of death imposed against petitioner in the instant cause is not violative of any constitutional rights as the aggravating circumstance that petitioner committed the offense of capital murder for himself for purposes of receiving something of monetary value, as provided for in § 565.012.2(4) of the Missouri statutory scheme, is not constitutionally vague, nor was it applied to petitioner in a manner not forseen by the Missouri legislature at the time of its enactment. Petitioner alleges as his sixth point of his request for a writ of certiorari that the murder was committed to receive something of monetary value or money clearly is meant to refer to contract murder or murder for hire because any other meaning applied to it would make it first degree murder. First of all, respondent would

point out that the fact that an aggravating circumstance would also constitute an act which would be a felony which could support the conviction of first degree murder under § 565.003, RSMo 1978, if the killing was unintentional, does not indicate that the legislature did not intend this to be a situation warranting the use of this aggravating circumstance.

With respect to whether or not an aggravating circumstance, which also might be considered a "first degree murder" under the Missouri statutory scheme, respondent would point out that aggravating circumstances now include the situation where the perpetrator kills while attempting to rape or sodomize his victim. Clearly, under § 565.003, RSMo 1978, an unpremeditated killing during the commission of a rape is first degree murder. However, what separates killing one to receive money or any other thing of monetary value from a murder committed during the robbery or any other act which would be a felony is the fact that the killing is premeditated. This situtation does amount to an objective standard as the aggravating circumstance will never be triggered unless the jury has first found the element of deliberation and premeditation. Once that element is found, and the jury moves onto the sentencing phase of trial, it is guided to consider the motive behind the murder. Certainly, this is the type of standard by which one should judge the defendant as to whether or not he should be exposed to the penalty of death as he has assigned a monetary value to life which is repugnant to this society's values. This situtation is not inherently misleading and is not arbitrary as it guides the jury into considering the motive behind the murder.

VII.

The judgement of capital punishment in the instant cause is not violative of any of petitioner's constitutional rights as the aggravating circumstance that petitioner was an escapee at the time of the murder was supported by admissible evidence upon which the jury could find beyond a reasonable doubt that petitioner was an escapee at the time of the murder, and this aggravating circumstance sufficiently limits the imposition of the sentence of death so as not to violate the Eighth Amendment prohibition against cruel and unusual punishment.

Contrary to petitioner's assertion in his petition at page 25, the judgment resulting from a guilty plea of petitioner that he was an escapee at the time of the commission of this instant capital murder was admissible. A certified copy of said judgment was introduced into evidence and there was no objection from petitioner at that time that it was inadmissible. Such a judgment would be admissible in a federal proceeding Fed.R.Evid. 902(4). At no time prior to this petition being filed in the United States Supreme Court has petitioner ever asserted that the judgments entered against him for prior convictions were invalid for any reason. Respondent suggests that it is inappropriate for him at this time to suggest that an aggravating circumstance was not supported by the evidence on a theory that the evidence was inadmissible because it was part and parcel to a plea agreement which petitioner refused and failed to carry out. If these judgements were in any way tainted, it was not on the part of the state

and the state has no authority to set aside the guilty pleas which were entered into evidence. Petitioner sufficiently satisfied with the guilty pleas entered in the City of St. Louis, Missouri, to allow same to stand for over a two year period. Respondent suggests that petitioner's complaint about these convictions on the theory that they are not valid because petitioner did not enter a guilty plea to a cause in another county in circuit court finds no basis in fact or law.

With respect to this particular aggravating circumstance, this Court has always held, and has been understood to have stated, that the purpose of the aggravating circumstance is to create a meaningful distinction between the case wherein a death penalty may be imposed without being done so arbitrarily from those caes where it is not to be imposed. Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 49 L.Ed.2d 973 (1976). The aggravating circumstance itself is not sufficient to justify imposition of the death, but serves as a threshhold requirement to consideration of the penalty. Such was the case in Spinkinlink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), rehearing denied 441 U.S. 937 (1979). Respondent suggests first that the Missouri statutory scheme properly guides and focuses the jury's objective consideration of the individual offender and the individual offense prior to imposition of a death penalty. See Jurek v. Texas, 428 U.S. 262, 274, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Respondent suggests further that allowing the jury to consider

whether or not petititioner was an escapee at the time of the offense is just such an appropriate aggravating circumstance to trigger the jury's consideration over whether or not petitioner's character and the crime would justify capital punishment. As may be seen by an examination of the Missouri statutory scheme, the jury does not have to impose death even if it finds an aggravating circumstance beyond a reasonable doubt. Thus, petitioner's apparent assertion that the fact of being an escapee at the time of the crime is insufficient and renders the penalty disproportionate to the crime ignores the fact that once this aggravating circumstance is found, the jury may consider the various facets of the defendant's character such as this is his third homicide conviction and that he has numerous armed criminal action convictions.

VIII.

The judgement of sentence of death imposed upon petitioner does not violate the constitution prohibition against cruel and unusual punishment or equal protection as the Missouri statutory scheme, as enforced by the Missouri Supreme Court, sufficiently guards against capricious imposition of the penalty of death.

Petitioner suggests to this Court that the Missouri Supreme Court and its trial courts have failed to apply the safeguards in such a way as to avoid arbritary and capricous imposition of the death penalty. Petitioner would also state that the "tears of jurors in St. Louis County attest to this fact" and they should cease. However, there is no evidence or anything in the record, which would indicate

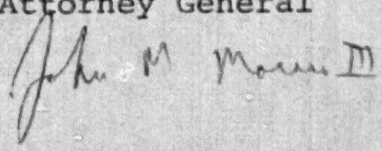
that the jurors of St. Louis County are crying. Rather, the record is replete with examples of the Supreme Court of Missouri reviewing the petitioner's death sentence and comparing it with other cases, considering whether or not there was any evidence to support aggravating circumstances, considering whether or not this sentence was disproportionate to other sentences imposed in this state, and in short, fulfilling duty under § 565.014, supra. The Missouri Supreme Court reviews death penalties in the same manner that the Georgia Supreme Court reviews death penalties. Said procedure was found constitutionally sufficient in Gregg v. Georgia, supra. Petitioner advances no reason for this court to review its decision in Gregg v. Georgia, supra, and respondent suggests to this Court that there is none. Thus petitioner is not entitled to review by means of a writ of certiorari.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



JOHN M. MORRIS III
Assistant Attorney General

NANCY K. BAKER
of Counsel

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent